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No. 05-___

IN THE

Supreme Court of the United States

Douglas Edwin Pierce,

Petitioner,

v.

L.E. Fleming, Warden, Federal Medical Center Fort Worth.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court resolve the three-way conflict among seven circuits over whether a federal judge can require a defendant to serve a term of imprisonment consecutively to another sentence that has not yet been imposed?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Douglas Edwin Pierce respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-3a) and the district court's order (Pet. App. 4a-5a) are unpublished. The court of appeals issued its opinion on October 14, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. 3584(a) provides:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

STATEMENT

This case involves a recurring question in federal criminal sentencing: whether a district court may order that its sentence be served consecutively to a state sentence that has not yet been imposed. As the government has recently acknowledged in its brief in opposition to the petition for

certiorari in *Cox* v. *United States*, No. 05-454, this question is the subject of a broad and long-standing division among the courts of appeals. See *Cox* BIO 5. In this case, the Fifth Circuit held that a district court has the power to order that its sentence be served consecutively to a sentence that had not yet been imposed in state court.

1. The sentencing question arises in this case because petitioner was charged in both state and federal court for crimes arising out of the operation of a methamphetamine lab. The relevant facts are undisputed. On January 25, 2000, petitioner was arrested by local police in Hill County, Texas, and charged with the state law crimes of "Engaging in Organized Crime" and "Conspiracy to Manufacture Methamphetamine."[1] Petitioner was initially released on bond, but after he failed to appear for a hearing he was re-arrested and charged with bail-jumping.

While awaiting his state trial, petitioner was charged by federal prosecutors with conspiracy to manufacture methamphetamine in violation of 21 U.S.C. 841 and 846. Petitioner pled guilty to the federal charges and, on January 3, 2002, was sentenced to seventy-eight months' imprisonment. The federal district court did not specify whether the sentence was to be served consecutive to or concurrent with any future sentence from the pending state prosecution. See Judgment In A Criminal Case, No. W-01-CR-006(01) (W.D. Tex. Jan. 7, 2002). Accordingly, petitioner was committed to the custody of the U.S. Bureau of Prisons (BOP) to begin serving his federal sentence.

Subsequently, petitioner entered into a plea agreement with state prosecutors in which he agreed to plead no contest to the bail-jumping charge. In exchange, the state drug

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[1] The underlying facts of this case were not discussed in the opinion of either the district court or the court of appeals below. However, the basic facts are undisputed and are described in the government's brief before the Fifth Circuit. See Resp. C.A. Br. 2-5.

charges against him would be dropped and the state court would order that petitioner's sentence be served concurrently with his previously imposed federal sentence. Pursuant to this agreement, on February 21, 2002, petitioner was sentenced in state court to a term of imprisonment of "three years with the imposition of the sentence concurrent with any federal sentence that you may have already received, plus court costs." Excerpt of Proceedings, Judge's Order, *State of Texas* v. *Pierce*, No. 31,752 (Dist. Ct., 66th Jud. Dist., Tex. Feb. 21, 2002). See also Judgment 3 (indicating that sentence was "to run concurrent with federal sentence"). Petitioner was then remanded to state custody, where he served out his state sentence.

Upon his parole from state prison on June 28, 2002,[2] petitioner was immediately taken into federal custody. Initially, the BOP credited petitioner with the time served in state custody under his state sentence (652 days), consistent with the state court's judgment. See Petr. C.A. Br. Ex. B (BOP Sentence Monitoring report, Oct. 23, 2002). However, in January 2003, the BOP reversed itself. The BOP informed petitioner that he would not be given credit for the time spent under his state sentence and, instead, would be credited for only 33 days. *Id.* Ex. C, F. Petitioner filed an internal grievance contesting the change. In response, prison officials informed petitioner that on May 29, 2003, officials contacted the federal district court "to determine if the Court had any objections to your federal sentence running concurrent with your state sentence." *Id.* Ex. E. Officials reported that on "June 22, 2003, a letter was received from the U.S. District Court for the Western District of Texas stating that it was the Court's wish for your federal sentence to run consecutive to your state sentence." *Ibid.* Relying on a BOP manual, officials had recalculated petitioner's sentence, providing credit only for the small portion of petitioner's time in pre-

[2] Petitioner was given credit toward his state sentence for some of the time served prior to sentencing.

trial federal detention that was not credited to his state sentence. *Ibid.* (citing Bureau of Prisons, *Sentence Computation Manual (CCCA of 1984)*, § 5880.28). Petitioner appealed this determination through the BOP grievance process without success.

On May 29, 2005, petitioner asked the state court to revise its judgment to give effect to its original intent and to the plea agreement. Petitioner explained that "the only way for me to receive the benefit of the plea agreement made in your Court is for you to vacate my original sentence" because in that case the BOP would, under its regulations, credit the time served in state custody toward the federal sentence. Request to vacate judgment, *State of Texas* v. *Pierce*, No. 31,752 (May 29, 2005). On June 6, 2005, the state court responded, indicating that it "hereby reaffirms said granting, of a concurrent sentence in your above referenced cause #31,752 and any federal sentence you are serving." Advisal Letter (June 6, 2005). However, the court also indicated that it was powerless to make its intent effective in light of the BOP's actions: "This Court has no jurisdiction to alter its Order as more than 30 days have expired since judgment herein was signed, and it has no jurisdiction over the federal judicial system." *Ibid.*

2. On May 10, 2004, petitioner filed this action, seeking a writ of habeas corpus pursuant to 28 U.S.C. 2241. Petitioner argued, among other things, that under 18 U.S.C. 3584(a), the federal sentencing court lacked the legal authority to make his federal sentence run consecutive to a state sentence that had not yet been imposed. That statute provides in relevant part that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively." Petitioner argued that the necessary implication of this provision was that a sentencing court has discretion to decide whether its sentence is to be concurrent or consecutive only if it is imposing both

sentences at the same time or if the first sentence has already been imposed. When the sentences are imposed at different times, petitioner contended, the statute places the decision of whether to make the sentences consecutive in the hands of the second court, not the first.

Respondent moved to dismiss, arguing that under Fifth Circuit precedent, the district court clearly had discretion to make its sentence run consecutive to any subsequent state sentence. The district court agreed, granting summary judgment in favor of respondent and adopting by reference the reasons stated in respondent's motion to dismiss. Pet. App. 4a.

On appeal, the Fifth Circuit affirmed. Pet. App. 2a. Citing 18 U.S.C. 3584(a) and settled circuit precedent, the court held that the "sentencing court had the discretion to order that a federal term of imprisonment run either consecutively to or concurrently with an anticipated, but not yet imposed, state sentence." Pet. App. 2a (citing *United States* v. *Brown*, 920 F.2d 1212, 1217 (CA5 1991)).

This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents the same question as the pending petition in *Cox* v. *United States*, No. 05-454. In its brief in opposition in *Cox*, the government has conceded that "the courts of appeals disagree about whether a federal court has the authority to direct that a sentence be served consecutively to a yet-to-be imposed state sentence." *Cox* BIO 5. In particular, the government acknowledges that the Fifth, Eighth, Tenth, and Eleventh Circuits have held that district courts have such authority, while the Sixth, Seventh and Ninth Circuits have held that they do not. *Ibid.* The division has endured for more than a decade, persistently resulting in dramatically disparate sentences for similarly situated defendants across the nation. The only reasons proffered by the government in *Cox* for denying certiorari to resolve this entrenched circuit split are the government's belief that

resolution of the split "is unnecessary," *id.* 6, and its assertion that *Cox* "is not a suitable vehicle to resolve the conflict," *id.* 8. As discussed below, this case illustrates why the government's first objection is unfounded. Moreover, this case presents none of the vehicle problems that purportedly exist in *Cox* and the three previous petitions in which this Court has been presented with the question – all of which the government opposed on the ground that the particular cases presented poor vehicles. Accordingly, the petitions in both this case and *Cox* should be granted and the cases consolidated for argument.[3]

The government has never disputed that the question presented in this case and *Cox* is of recurring importance in numerous cases given the frequency with which defendants are charged with both state and federal crimes arising out of the same or related incidents. This case is typical: petitioner's involvement in the manufacturing of methamphetamine resulted in his indictment by both state and federal prosecutors, inevitably giving rise to the question of which court would control whether the state and federal sentences would run consecutively or concurrently to one another. The depth and duration of the circuit split, discussed below, arises precisely because the question is of such recurring importance.

The need for a clear and simple federal rule to resolve this question is evident. The fact that the question currently stands unresolved creates recurring conflicts between different sentencing courts and, frequently, between state and federal judges. While neither state legislatures nor Congress have the power to control the other's sentencing practices, Congress sought to resolve the potential for conflict by enacting 18 U.S.C. 3584(a). However, the efficacy of that solution has been substantially diminished by the division among the courts of appeals over the meaning of that

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[3] Because the petitioners in both cases are represented by the same counsel, the cases can be efficiently consolidated.

provision in its most common and important application. Intervention by this Court is required.

I. The Circuits Are Irreconcilably Divided Over The Construction Of 18 U.S.C. 3584(a).

As the government has acknowledged in *Cox*, the Sixth and Ninth Circuits interpret Section 3584(a) to withhold from a district court the power to determine whether its sentence shall run concurrently or consecutively to a future sentence that may be imposed by another court. See *Cox* BIO 5; *United States* v. *Quintero*, 157 F.3d 1038, 1039-40 (CA6 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (CA9 1991). When, as in this case, the defendant is not "already subject to an undischarged term of imprisonment," these courts hold, the decision whether any future sentence shall be served consecutively to the initial federal sentence is left to the later sentencing court.[4]

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[4] Although the Second Circuit had interpreted a predecessor to Section 3584(a) as granting federal courts authority to order a sentence to run consecutively to an unimposed state sentence, see *Salley* v. *United States*, 786 F.2d 546, 547-48 (CA2 1986), that court has more recently held (in square conflict with the Seventh Circuit, see *infra* at 9) that Section 3584(a) does not establish a default rule that a federal sentence will run consecutively to an unimposed state sentence when the federal sentencing judge is silent. See *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75 (CA2 2005) ("the absence of any specification by the federal court as to whether its sentence should run concurrently or consecutively does not signify intent that the sentences run consecutively because the federal court may not even know that another sentence is about to be imposed"); *McCarthy* v. *Doe*, 146 F.3d 118, 122 (CA2 1998) ("there is no basis to infer any intention as to consecutive or concurrent service from the [federal] sentencing judge's silence, which could equally well indicate either that the judge did not know another sentence would be imposed, or did not know what the future [state] sentence would be").

Accordingly, there is no question that had petitioner been sentenced in Detroit or San Francisco, his term of imprisonment would be substantially less than it is in this case solely because he was sentenced instead in Fort Worth, Texas. Indeed, as the government has acknowledged, the Fifth, Eighth, Tenth, and Eleventh Circuits all adopted precisely the opposite of the rule applied in the Sixth and Ninth Circuits, holding that a federal court has the power to order that its sentence be served consecutively to a sentence of another court, even if that sentence has not yet been imposed. See Pet. App. 2a; *United States* v. *Andrews*, 330 F.3d 1305, 1307 (CA11), cert. denied, 540 U.S. 1003 (2003); *United States* v. *Sumlin*, 317 F.3d 780, 782 (CA8 2003); *United States* v. *Hernandez*, 234 F.3d 252, 256 (CA5 2000) (per curiam); *United States* v. *Williams*, 46 F.3d 57, 58-59 (CA10), cert. denied, 516 U.S. 826 (1995). These courts reject the view that by specifically authorizing a federal court to decide whether its sentence shall be consecutive when the defendant is "already subject to an undischarged term of imprisonment," Congress has withheld the power to make the sentence consecutive to a sentence that has not yet been imposed. See, *e.g.*, *Williams*, 46 F.3d at 59.

The circuits further disagree as to the meaning of the final sentence of Section 3584(a), which states that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." The Sixth Circuit reads that sentence as applying only when the second sentencing court fails to designate whether the later sentence shall be consecutive or concurrent. See *Quintero*, 157 F.3d at 1040.[5] The Tenth Circuit, on the other hand, reads the sentence as requiring consecutive sentences even if the second sentence is imposed by a state court and even if that state court specifies that its sentence shall be served concurrent to a prior federal sentence. See *Williams*, 46 F.3d at 58.

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[5] See also *McCarthy*, 146 F.3d at 121-22.

The Seventh Circuit has adopted elements from each side of the split. See *Romandine* v. *United States*, 206 F.3d 731 (CA7 2000). The Seventh Circuit essentially agrees with the Sixth and Ninth Circuits that "[n]either sec. 3584(a) nor any other statute of which we are aware authorizes a federal judge to declare that his sentence must run consecutively to some sentence that may be imposed in the future." *Id.* at 737. Nonetheless, like the Tenth Circuit, that court construes the final sentence of Section 3584(a) as rendering *all* federal sentences consecutive to any future sentence that may be imposed by another court, even if neither the first nor the second sentencing court concludes that consecutive sentences are appropriate. *Id.* at 737-38. However, the Seventh Circuit has suggested, this result may be circumvented by the BOP designating the state prison as the "official detention facility at which the sentence is to be served," in which case the inmate would be given credit on his federal sentence for time served for the state conviction. *Id.* at 738 (quoting 18 U.S.C. 3621(b)). But that decision is left, in the Seventh Circuit's view alone, to the executive branch, not to the district court. *Ibid.*[6] Significantly, the BOP itself has rejected the Seventh Circuit's view and considers itself bound by the district court's determination of whether the prior federal sentence is to be served consecutive to a subsequently imposed sentence of another court. See BOP Program Statement 5160.05 ¶ 9(b)(4)(f); *id.* 5880.28, at 1-32A.

2. The government does not dispute that the split is mature, entrenched, and intractable. The conflict has persisted since at least 1991 and has broadened, rather than narrowed, in recent years. Compare, *e.g.*, *United States* v.

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[6] See also *United States* v. *Randolph*, 80 Fed. Appx. 190, 196 (CA3 Oct. 20, 2003) (unpublished) ("a defendant in Randolph's position must serve his state and federal terms of imprisonment consecutively unless he can convince the Bureau of Prisons to designate the state prison as 'the official detention facility at which the sentence is to be served'").

Mayotte, 249 F.3d 797, 798 (CA8 2001) (district court has power to order sentence to be served concurrent or consecutive to later sentence) with *Romandine* v. *United States*, 206 F.3d 731 (CA7 2000) (district court lacks that power, although separate sentences are consecutive by default); *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 74 (CA2 2005) (rejecting Seventh Circuit holding that separate sentences are consecutive by default); and *United States* v. *Quintero*, 157 F.3d 1038, 1039-40 (CA6 1998) (district court lacks power to order sentence served concurrent or consecutive to future sentence, and sentences are not consecutive by default).

Moreover, the disagreement is considered, not inadvertent. For example, in *Quintero*, the Sixth Circuit expressly acknowledged the divergent views of the circuits adhering to the majority rule but nonetheless declined to follow those courts, reasoning that its construction of the statute was most consistent with the text and legislative history of the statute. See 157 F.3d at 1040. By contrast, in *United States* v. *Mayotte*, 249 F.3d 797, 799 (2001), the Eighth Circuit acknowledged not only the circuit split but also the "concerns discussed by the circuits holding the minority view" – namely, that conferring power on a federal court to control how a later-imposed state sentence is served undermines principles of comity and that conferring that power on the Attorney General raises separation-of-powers problems. Nonetheless, the Eighth Circuit was "persuaded to adopt the majority view." *Ibid.* See also, *e.g.*, *Romandine*, 206 F.3d at 738 (Seventh Circuit acknowledging split); *Andrews*, 330 F.3d at 1306 (Eleventh Circuit acknowledging split).

Nor is there any realistic prospect that the courts of appeals will resolve the division themselves. For example, the Tenth Circuit recently denied a petition for rehearing en banc in *Cox*. See *Cox* Pet. App. 2a. Moreover, at least five circuits now regard their prior holdings as sufficiently settled that they simply cite their prior cases without further

elaboration. See, *e.g.*, *ibid.* (noting Cox's argument but concluding that that in light of prior circuit precedent the "panel can do nothing for him"); *Andrews*, 330 F.3d at 1307 ("we cannot ignore *Ballard*'s clear holding that a court does have the authority to impose a consecutive sentence to an unimposed, future sentence"); *United States* v. *Sumlin*, 317 F.3d 780, 782 (CA8 2003) (deeming the holding in *Mayotte* "dispositive" of the question whether district courts have authority to require that sentence run consecutively to unimposed sentence); *United States* v. *Hernandez*, 234 F.3d 252, 256 (CA5 2000) ("under our precedent, the district court may order that a federal sentence run concurrent with a forthcoming state sentence"); *United States* v. *Stewart*, 71 Fed. Appx. 590, 592 (CA7 Jul. 30, 2003) (unpublished) (relying, without any additional discussion, on *Romandine*).

Finally, as noted above, this Court's intervention is further warranted because the question presented is frequently recurring, arising not only on direct appeal,[7] but also – as this case demonstrates – in federal post-conviction proceedings.[8]

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[7] See, *e.g.*, *Andrews*, 330 F.3d 1305; *United States* v. *Floyd*, 80 Fed. Appx. 87 (CA10 Oct. 30, 2003) (unpublished); *United States* v. *McDaniel*, 338 F.3d 1287 (CA11 2003); *Stewart*, 71 Fed. Appx. 590; *Sumlin*, 317 F.3d 780; *Mayotte*, 249 F.3d 797; *Quintero*, 157 F.3d 1038; *United States* v. *Ballard*, 6 F.3d 1502 (CA11 1993); *United States* v. *Brown*, 920 F.2d 1212 (CA5 1991); *Clayton*, 927 F.2d 491.

[8] See, *e.g.*, *Brown* v. *Ashcroft*, 41 Fed. Appx. 873 (CA7 June 21, 2002) (unpublished); *Jones* v. *Winn*, 13 Fed. Appx. 419 (CA7 Jun. 29, 2001) (unpublished) (same); *Hernandez*, 234 F.3d 252; *Romandine*, 206 F.3d 731; *Tinsley* v. *United States*, No. 95-5564, 1997 U.S. App. LEXIS 2688, at *11 (CA6 Feb. 12, 1997) (unpublished); *United States* v. *Neely*, 38 F.3d 458 (CA9 1994) (per curiam).

II. Resolution Of The Circuit Split Is Necessary To Ensure Fair Treatment Of Similarly Situated Defendants And To End The Unauthorized Invasion Of State Sentencing Prerogatives.

The current division among the courts of appeals is untenable, creating substantial sentencing disparities based on accidents of geography and permitting an unremitting invasion of state court sentencing prerogatives Congress intended to protect.

1. The circuit conflict predictably results in substantially disparate treatment of similarly situated federal defendants, even among those serving time in the same federal prison for indistinguishable offenses.

In this case, for example, there can be no dispute that if petitioner had been sentenced in Tennessee rather than Texas, his time in custody would have been reduced by nearly a third. The disparity in other cases can be even more substantial. For example, unless this Court intervenes, the defendant in *Cox* likely will remain in prison *fourteen years* longer than he would if he had been sentenced in the Sixth or Ninth Circuits. See *Cox* Pet. 10.

This disparate treatment has been incorporated into BOP policies. Currently, if a federal judge in the Fifth, Eighth, Tenth, or Eleventh Circuits orders that a defendant serve his federal sentence consecutive to a future state sentence, the BOP will refuse to accept custody of a state prisoner until his full state sentence has been served, no matter what the state court decides. See BOP Program Statement 5160.05 ¶ 9(b)(4)(f) ("The Bureau will not allow a concurrent designation if the sentencing court has already made a determination regarding the order of service of sentence (e.g., the federal sentencing court ordered the sentence to run consecutively to any other)"); *id.* 5880.28, at 1-32a ("On occasion, a federal court will order the federal sentence to run concurrently with or consecutively to a not yet imposed term of imprisonment. Case law supports a court's discretion to

enter such an order and the federal sentence shall be enforced in the manner prescribed by the court.").[9]

And because federal inmates may be imprisoned outside of the circuit in which they were sentenced, similarly situated inmates even within the same institution may be subject to substantially disparate sentences resulting solely from the courts' conflicting interpretations of 18 U.S.C. 3584(a). Such irrational disparities diminish confidence in the criminal justice system's fairness and integrity among inmates, their families, and the broader community.

2. This Court should also grant certiorari because the split of authority implicates the important sovereign interests of state criminal justice systems.

First, as discussed *infra* at 21-30, the majority view in the circuits erroneously permits federal district courts to invade the sentencing prerogatives of state courts. Properly construed, Section 3584(a) operates to ensure that federal courts do not usurp the authority of a subsequent court, including a state court, to independently evaluate whether its sentence should be served concurrently or consecutively to a prior federal sentence. That authority, however, has been revoked by the interpretations of the courts of four federal circuits.

Second, and relatedly, the majority circuit view substantially interferes with the ability of state prosecutors to negotiate plea bargains they deem to be in the public interest.

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[9] The circuit split also gives rise to difficult questions of administration when an inmate is subject to both an initial federal sentence and a sentence later imposed by a state or federal court located within the geographic confines of another circuit, possibly one with a different rule. See, *e.g.*, *Cozine* v. *Crabtree*, 15 F. Supp. 2d 997 (D. Or. 1998) (holding that federal sentence imposed within Fifth Circuit cannot be consecutive to sentence later imposed by California because Ninth Circuit rejects Fifth Circuit's reading of Section 3584(a)).

Under the law in these circuits, a state court is rendered powerless to implement an agreement that calls for a state sentence running concurrent with a prior federal sentence. In this case, for example, state prosecutors determined – in light of their view of the evidence and the equities of the case and in accordance with state law enforcement priorities – that rather than incur the cost and risk of a jury trial, they were willing to settle on a plea of no contest to lesser charges and a punishment consisting of a state sentence running concurrent to the prior federal sentence. Had it been clear that the state court would be unable to effectuate that deal, the parties in the state proceeding may well have been prevented from reaching a mutually satisfactory plea bargain, leading to an otherwise unnecessary trial.

3. In its brief in opposition in *Cox*, the government has argued that "[r]esolving [the circuit] conflict is unnecessary," BIO 5-6, because, with sufficient imagination and manipulation, a second sentencing court can circumvent the first court's determination that the sentences should be consecutive even in those circuits that, like the Fifth, hold that Congress intended the first court to have the power to make that sentence consecutive. That argument is flawed in both its premise and its conclusion.

The premise of the argument – that state courts can easily circumvent a prior federal court's order that the state and federal sentences be served consecutively – ignores the many situations in which a state court will be unable, as a matter of state law, to undertake the machinations recommended by the government in *Cox*. For example, the government has suggested that a state court can effectively ensure a concurrent sentence by reducing the state sentence by the amount of the prior federal sentence. See *Cox* BIO 7. But this avenue would be foreclosed in many cases in which the defendant is subject to a mandatory minimum sentence under state law. See, *e.g.*, Pet. for Cert. 11, *Andrews* v. *United States* (No. 03-136) (involving state drug charge carrying a three-year minimum sentence, pursuant to which state court

could not depart downward to circumvent the federal court's order of consecutive sentences). State sentencing guidelines may similarly restrict the ability of state courts to evade a federal court's order by reducing a state sentence.

In any case, even when state law empowers a state court to reduce its sentence in an end-run around a federal court's consecutive sentence designation, implementing the plan would be far from simple. To ensure that a consecutive sentence is equivalent to the concurrent sentence that it would have preferred to impose, the state court cannot merely reduce the state sentence by the length of the federal sentence. Instead, it must also factor myriad considerations – such as good time and earned credits, the nature of the offenses at issue, and discrepancies between the federal and state sentencing schemes – into a complicated calculus to arrive at an equivalent sentence. Moreover, if a state court determines to reduce its sentence to ensure concurrent sentencing, it runs the risk that the federal sentence may be reduced or eliminated altogether in some subsequent proceeding, thereby resulting in a prisoner's serving a shorter sentence than the state had determined to be appropriate.

A related failure of foresight prevented the state court from effectuating its intent in this case. At the time of the state court sentencing, the district court had subjected petitioner to a federal sentence of seventy-eight months without stating whether it intended that sentence to be served concurrently or consecutively to the sentence that might be imposed at some point in the future in the state prosecution. In accordance with the state plea bargain, the state court ordered that the state sentence be served concurrent with the prior federal sentence. At that point, the state court had no reason to believe that it was required to reduce its sentence or engage in any other manipulation in order to ensure that its intent was effectuated.[10] By the time the federal court

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[10] As noted above, *supra* at 8-9, some circuits have held that unless the district court states otherwise, a federal sentence shall be

clarified its intent that the sentences should be consecutive, it was too late for the state court to reopen its prior judgment in order to thwart the district court's order.

Those state courts willing and able to manipulate their sentencing in the manner suggested by the government also face a real prospect of a battle of wills with the prior federal court and the Bureau of Prisons. Cf. *Cozine* v. *Crabtree*, 15 F. Supp. 2d 997, 1013 (D. Ore. 1998) ("Federal officials' recalcitrance in honoring California concurrent sentences has been a continuing source of conflict for decades * * *."). This battle of wills is exactly what resulted in *Cox*. In that case, the federal court ordered that Cox's federal sentence run consecutive to any subsequent state sentence. State officials, however, had agreed to a plea bargain under which Cox would plead guilty in exchange for a state sentence to be served concurrently with his federal sentence. Because Cox was by that time in state custody awaiting his state sentencing, the state judge was faced with a dilemma. If he ordered a concurrent sentence and kept Cox in a state facility until the state term was served, Cox faced the very real prospect that he would not receive any federal credit for the time served in state prison, thereby thwarting the state court's intent to impose a concurrent sentence. To avoid this, and to effectuate the plea agreement, the state court released Cox on a bond to force federal officials to place him in federal custody, where his time would count toward his federal sentence (and, under the plea agreement, toward Cox's state sentence as well). See Denver County Dist. Ct., Colo., Case No. 2003 CR 2984, Minute Order (Mar. 18, 2005). This jousting between state and federal officials – apparently endorsed by the government as an acceptable substitute for review of the question presented by this Court – is a far cry from the "spirit of reciprocal comity and mutual assistance"

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consecutive to any future unimposed sentence. The Fifth Circuit has not, however, so held.

that this Court has long advocated. *Ponzi* v. *Fessenden*, 258 U.S. 254, 259 (1922).

All of this, of course, presumes that state courts will believe that manipulating their sentencing to avoid the effect of a prior federal court order is both legal under Section 3584(a) and appropriate as a matter of comity. Many state courts may well view such manipulations as improper in light of circuit precedent declaring it the federal court's prerogative to determine whether the state and federal sentences shall be concurrent or consecutive. Indeed – as the government has never disputed – petitioner has been able to identify only one case in which the later state sentencing court successfully circumvented the designation of a federal sentence as consecutive to an unimposed term of imprisonment. See *Williams*, 46 F.3d at 57 (describing state court's sentencing reduction).

In the end, even if the government were right that in at least some cases a state judge can circumvent a prior federal court's improper sentencing designation, that would be no reason to deny certiorari. The point of Section 3584(a) is to permit a state court to effectuate its intent simply by declaring it. Being required to resort instead to sentencing manipulations (and perhaps even requiring state legislatures to repeal mandatory minimum sentences or amend state sentencing guidelines) in order to exercise a power Congress intended to preserve to the States constitutes an affront to the dignity and sovereignty of the state criminal justice system. That affront should be corrected by this Court in this case.

4. While petitioner has focused on the affront to a state court entering a subsequent judgment, the same problem arises when the second sentencing court is another federal district court. In that circumstance, the government has yet to offer an explanation of what the second district court could do to implement its determination that its sentence should run concurrent with the first. If the two courts are in the same circuit, the government cannot seriously contend that the

second court would be permitted, under circuit precedent, to thwart the first court's determination. In any case, as is true in the state courts, the ability of a subsequent federal district court to implement a strategy of circumvention would often be limited by mandatory minimums and federal sentencing guidelines.

5. Finally, it bears noting that for whatever reason, the government's suggested circumventions have not, in fact, been employed by state and district courts. As a result, the circuit split has, in fact, created persistent disparate sentences for similarly situated defendants across the nation. The government's hypothetical stratagems have not cured these disparities thus far and there is no reason to think that they will in the future. Intervention by this Court is required.

III. This Case Presents An Ideal Vehicle For Resolving The Circuit Split.

The only other ground the government has given for denying the petition for certiorari in *Cox* is its assertion that the particular circumstances of that case make it a poor vehicle for deciding the question presented. See *Cox* BIO 8-9. That argument lacks merit for the reasons given in the reply brief in support of certiorari in *Cox*, but in any event this case presents the question in an ideal posture.

The question presented in this petition was raised in, and decided by, the court of appeals. Pet. App. 2a-3a. In the Fifth Circuit, the government did not contest that the issue was preserved in the district court and properly subject to decision on appeal. See Resp. C.A. Br. 10. And the sole ground on which the court of appeals relied in rejecting petitioner's Section 3584(a) claim was that it was precluded by the prior circuit precedent that the government acknowledges is in conflict with the decisions of other courts. See Pet. App. 2a-3a (disposing of claim on the authority of *United States* v. *Brown*, 920 F.2d 1212, 1217 (CA5 1991)); *Cox* BIO 5 (citing *Brown* as part of circuit split). Moreover, petitioner would

unquestionably benefit from a ruling in his favor, as the Bureau of Prisons postponed his release date based solely on its conclusion that the district court validly ordered that the state and federal sentences be served consecutively. *Id.* 2a-3a.

Nor does this case present any of the vehicle problems on which the government has relied in opposing certiorari on this issue in prior cases.[11] In *Andrews* v. *United States*, No. 03-136, for example, the government argued that the case was an inappropriate vehicle because no court had expressed the desire to have its sentence run concurrently. *Andrews* BIO 10. In this case, however, the state court's intent to impose a concurrent sentence has been made clearly and repeatedly. See *supra* at 3-4.[12]

The other objection the government raised to the petitions in *Cox* and *Andrews* was that the state court had not yet issued its sentence in *Cox* and had already issued its decision in *Andrews*. That is, in *Cox*, the government has objected that because the state court has not yet imposed its sentence "it is at best unclear how the state and federal sentences will interact," rendering petitioner's claim of harm "speculative." *Cox* BIO 9. That objection, of course, has no relevance here; both state and federal sentences have been imposed and it is clear that absent review by this Court, the state court's intention to impose a concurrent sentence will be overridden.

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[11] This Court has denied certiorari on the question presented in three prior cases, all of which presented poor vehicles, as the government explained in its oppositions to certiorari. See *Lackey* v. *United States*, 125 S. Ct. 2964 (2005) (No. 04-9286); *Martinez* v. *United States*, 125 S. Ct. 1299 (No. 04-7129); *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136).

[12] The Court denied certiorari in *Lackey* v. *United States*, No. 04-9286, after the government pointed out and the petitioner conceded that he had failed to preserve his objection in the lower court. In this case, petitioner clearly raised and preserved his argument that the district court lacked the authority to impose a consecutive sentence.

But the government argued in *Andrews* that a case in which both courts have issued their sentences is equally objectionable. This is so, the government asserted, because even if the defendant prevailed in this Court, there could be no remedy because on remand the federal court would become the second sentencing court, entitled to make its sentence consecutive to the now-prior state sentence. See *Andrews* BIO 14.

Thus, the government's position appears to be that a case is a bad vehicle if the state court has not yet issued its sentence, and an even worse one if it has. There can be little doubt, in light of this position, that the government has not been attempting to direct this Court to an appropriate vehicle to decide the question presented, but rather attempting to prevent this Court from ever deciding the question at all.

In any case, even if taken at face value, the objection to taking a case in which the issue is actually presented and of consequence – that is, a case in which a district court's order has, in fact, thwarted the intent of a subsequent state court to make its sentence concurrent – is meritless. The upshot of the government's argument – that even if a district court's sentencing order is illegal, there can never be a remedy – is strong reason to believe that the argument is wrong. Indeed, this Court's power to remedy the erroneous decisions of the lower courts is not so limited as the government briefs in *Andrews* and again *Cox* presume. See 28 U.S.C. 2106 (on appellate review, Supreme Court may "require such further proceedings to be had as may be just under the circumstances"). Among other things, the illegal portion of the sentence ordering that the subsequent state sentence be served consecutively may simply be declared ineffective, as would a court's unauthorized attempt to designate the facility in which an inmate is to be held. Cf. *United States* v. *Dragna*, 746 F.2d 457, 458 (CA9 1984) (where district court lacked authority to change sentence to designate inmate's place of confinement, original sentence without designation ordered reinstated), cert. denied, 469 U.S. 1211 (1985); see

also *State* v. *Blevins*, 394 N.W.2d 663, 664 (Neb. 1986) (modifying Nebraska court's sentence to strike from the sentencing order, as surplusage, the language, 'Said sentence shall be served consecutive to any sentence received by the defendant in Colorado'").

Such a course would be particularly appropriate in this case. In *Cox*, the government suggested that a remand for resentencing would be required to allow the district court to reconsider its prior decision that petitioner's Hobbs Act and gun possession sentences should run concurrently. *Cox* BIO 9-10 n.5. In this case, petitioner was convicted on a single count of conspiracy in violation of 21 U.S.C. 846. The only purpose that would be served by vacating the entire sentence would be to permit the district court a chance to attempt to re-impose the very consecutive sentence that this Court would have determined was illegal when entered. Nothing in the law requires that result or prevents this Court from reviewing this important question in this case.

IV. The Decision Below Is Erroneous.

1. As the Sixth and Ninth Circuits have recognized, Section 3584(a) has a simple structure. It is composed of three sentences. The first sentence enumerates the two specific situations in which a federal district court can control whether sentences are served concurrently or consecutively: first, when the sentencing court is imposing *both* sentences – that is, when it "imposes multiple terms of imprisonment on the defendant at the same time"; and second, when the sentencing court is imposing a sentence on a defendant who has already been sentenced by another court – that is, when the court "imposes a sentence on a defendant who is '*already subject* to an undischarged term of imprisonment.'" *Quintero*, 157 F.3d at 1040 (emphasis supplied by court). The final two sentences of the statute establish the default rules for each of these two situations. The penultimate sentence of the statute deals with the first situation – when the sentencing court itself is imposing all the sentences. When the sentencing court is

imposing all the sentences, the terms are to run concurrently unless the court specifies otherwise. The last sentence of the statute deals with the second situation – when the sentencing court is sentencing a defendant who has already been sentenced elsewhere. In this situation, the sentences are to run consecutively unless the second sentencing court specifies otherwise.

Nothing in the text of Section 3584(a) gives any power to a federal district court to control the relationship between a sentence it imposes and sentences by other courts that have not yet been imposed. As the Sixth Circuit explained in *Quintero*, 157 F.3d at 1040, "[t]he opening sentence of § 3584(a) establishes [when] this statute applies * * *. The presumptions established by the last two sentences of § 3584(a) must be read in light of this limiting language at the beginning of the section." And in particular, and contrary to the circuits adopting the majority position, nothing in the text of the statute provides any indication that it was intended to bind state court judges in subsequent proceedings. See *Luther* v. *Vanyur*, 14 F. Supp. 2d 773, 776 (E.D.N.C. 1997) ("Conspicuously absent is any discussion of the effect of the statute where there is a subsequent state sentence. This is not surprising. The statute directs the actions of federal officials, not the actions of state officials."); see also *Clayton*, 927 F.2d at 493 ("Based upon * * * the limited authority conferred by section 3584(a) * * * we hold that a federal district court does not have the authority to direct that a federal sentence be served consecutive to a state sentence not yet imposed."); *United States* v. *Smith*, 101 F. Supp. 2d 332, 343 (W.D. Pa. 2000) ("By [its] plain terms, [Section 3584(a)] appl[ies] where a defendant is already subject to a prior undischarged term of imprisonment, and do[es] not appear to embrace the situation where a defendant is simply incarcerated in a state facility while awaiting trial on state charges."). Even the Fifth Circuit, which applies the contrary rule, conceded that the Sixth and Ninth Circuits' reading is supported by the text's "plain language." *Hernandez*, 234 F.3d at 256.

Some of the circuits that have adopted the contrary rule read the final sentence of Section 3584(a) – providing that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently" – as if it were freestanding. But that reading actually supports the rule adopted by the Sixth and Ninth Circuits. If the final sentence is untethered from the prior sentences, which make clear that Section 3584(a) addresses two, and only two, situations – namely, when the sentencing court is imposing the relevant sentences simultaneously and when the sentencing court is imposing the relevant sentence on a defendant already sentenced in a prior proceeding – then the circuits taking the majority position have offered no reason why a judge imposing a subsequent sentence cannot simply override the first sentencing judge's directive. After all, that judge, too, can "orde[r] that the terms are to run concurrently."

2. The Sixth and Ninth Circuit's view not only better accords with the plain language of Section 3584(a), but also avoids rendering any of its language superfluous. This Court has repeatedly directed that courts should construe statutes so that "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879)). If the last sentence of the statute were an independent grant of authority to impose consecutive sentences in all cases in which two sentences are imposed at different times, then the first sentence would serve no purpose – it would be subsumed by the last. James J. Sample, Note, *The Sentences That Bind (The States)*, 103 COLUM. L. REV. 969, 984 (2003). In particular, it would render the "already subject to" language of the first sentence mere surplusage.

3. The majority position also violates canons of statutory construction designed to serve a variety of important constitutional concerns.

First, this Court has held that courts should avoid construing statutes in ways that raise serious federalism concerns. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Perhaps no aspect of states' power is more central to their role than enforcement of their criminal statutes. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) ("One of the primary functions of government * * * is the preservation of societal order through enforcement of the criminal law * * *.") (citations omitted). As already explained, the Fifth Circuit's interpretation permits federal courts to trench wholesale on a state court's judgment regarding how its criminal sentences should be served. It allows federal district courts universal latitude to override a state's considered judgment. Indeed, the order issued in this case requires that petitioner's federal sentence run consecutively to *any* state-court sentence imposed at *any* time in the future, even for crimes for which petitioner has not yet been charged or convicted – indeed, even for crimes that have not yet been committed. This is a breathtaking assertion of federal power. It places states that wish to impose concurrent sentences with the Hobson's choice of either acquiescing to a federal court's desire that all sentences run consecutively or forgoing sentencing a defendant at all. By contrast, the interpretation adopted by the Sixth and Ninth Circuits confines a federal court's authority to override a state's judgment to a narrower category of cases in which there are reasons to think the federal court has superior information – namely, cases in which the federal court acts subsequent to the state court.

Second, this Court has repeatedly held that statutes should be construed to avoid constitutional problems. See, *e.g.*, *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 180 (2003). Even the courts that permit federal district courts to control the execution of after-imposed sentences acknowledge that their rule gives rise to significant separation-of-powers and comity concerns. See *Mayotte*, 249 F.3d at 799. Under their reading, a federal sentence imposed while state charges

are pending is presumed to run consecutively to any later-imposed state sentence. Even if a subsequent state court decision orders that the sentence it imposes run concurrently and the prisoner is in state custody at the time of his state sentencing, effective control over service of the sentences passes to the federal BOP, because it has the power to decide whether to accept custody over the prisoner and therefore whether he will receive credit for service of his federal sentence.[13] The BOP is, of course, part of the executive branch, which also controls the prosecutorial function. Thus, the majority interpretation of Section 3584(a), by conferring the power to determine concurrency in the BOP, rather than in the courts, runs afoul of separation-of-powers principles.[14] See *Abdul-Malik*, 403 F.3d at 76; see also *Cozine*, 15 F. Supp. 2d at 1004 (recognizing possibility that "low-level prison officials can effectively override the decisions of the state and

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[13] Because a defendant already in state custody will begin serving the state sentence in a state prison first, the BOP has the discretion either to designate the state prison as the place of federal confinement or to refuse to start the clock on the defendant's federal sentence until the state sentence is fully served. See, *e.g.*, *Brown* v. *Ashcroft*, 41 Fed. Appx. 873, 874-75 (CA7 June 21, 2002) (unpublished) (noting BOP's sole discretion to make sentences run concurrently when federal court was silent and state court ordered concurrent sentences); see also *Barden*, 921 F.2d at 482-83 (same).

[14] To the extent that the separation of powers concerns voiced by the Second Circuit arise from the exercise of discretion on the part of the Attorney General, petitioner notes that such discretion is not supported by either the statute or its legislative history. Although the Attorney General has "wide discretion in choosing the place of a prisoner's confinement," *Barden*, 921 F.2d at 481, and – as this Court has found – the Attorney General has the responsibility for determining "sentencing credit," *United States* v. *Wilson*, 503 U.S. 329, 334 (1992), this is very different from granting the Attorney General the discretion whether to run an entire federal sentence consecutively to or concurrently with another sentence. See *supra* at 9.

federal sentencing courts"); see also *Griffin* v. *Pennsylvania Dep't of Corr.*, 862 A.2d 152, 158 n.7 (Pa. Commw. Ct. 2004) (describing as "troubl[ing]" the possibility that "administrative officials in certain instances, just by deciding whether an inmate is to serve federal or state time first, can determine whether an individual is to serve many years more in prison than the sentencing judges envisioned").

Particularly alarming is the prospect, which the Seventh Circuit's interpretation permits, that the BOP may impose a de facto sentence longer than either sentencing court had intended. See *Abdul-Malik*, 403 F.3d at 75. Under the Seventh Circuit rule, the first sentencing judge has no authority to order a sentence to run concurrently or consecutively, and only the BOP has discretion, regardless of what the judge may declare. *Romandine*, 206 F.3d at 737-38.[15] Because the interpretation of Section 3584(a) adopted by the Sixth and Ninth Circuits mitigates the separation-of-powers concerns inherent to the majority rule and exacerbated by the Seventh Circuit's rule, such a construction is preferable. *McConnell*, 540 U.S. at 180.

Third, the majority position ignores the rule of lenity. "'When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" *Scheidler* v. *Nat'l Org. Women*, 537 U.S. 393, 409 (2003) (quoting *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987)). See also, *e.g.*, Sample, *supra*, at 985-86. Thus, even if both the majority construction of the statute – viz., permitting federal district courts to control the execution of

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[15] To be sure, as noted above, *supra* at 9, the BOP itself declines the broad discretion accorded to it by the Seventh Circuit and will act in accordance with the intent of a federal judge. Nevertheless, given the Seventh Circuit rule, one would imagine that district courts will simply remain silent, thus triggering the BOP's discretion. Furthermore, the BOP may change its policy at any time.

subsequently imposed sentences – and the approach of the Sixth and Ninth Circuits – viz., prohibiting federal courts from exercising such control – were plausible, the latter approach should prevail.

3. A construction which infers that Congress intended to permit district courts to prohibit later courts from imposing a consecutive sentence also defies "common sense."[16] *McCarthy*, 146 F.3d at 122. In the case of an unimposed sentence, only the later sentencing court will know the total length of a consecutive term of imprisonment. Similarly, only the later sentencing court will be aware of a variety of factors – such as cooperation with the authorities or the relationship between the offenses underlying the two sentences – that may develop after the imposition of the first sentence and that might justify concurrent service. Thus, the later sentencing

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[16] This is only confirmed by the fact that in the overwhelming majority of states, state courts cannot bind subsequent courts in connection with non-existent sentences. See, *e.g.*, *People* v. *Lister*, 202 Cal. Rptr. 37, 38 (Ct. App. 1984) (holding that a California court "had no power to impose sentence consecutive to a federal sentence which had not yet been pronounced"); *People* v. *Flower*, 644 P.2d 64, 66 (Colo. Ct. App. 1981) ("a trial court may not require a sentence otherwise properly imposed to be served consecutively to some other sentence not yet imposed in another pending case."); *Oquendo* v. *Quinones*, 738 N.Y.S.2d 398, 400 (N.Y. App. Div. 2002) (construing a New York statute to bar a state court from ordering a sentence to run concurrently with a subsequent federal sentence); *State* v. *Alexander*, 162 Ohio App. 3d 333, 335 (2005) ("when a trial court imposes a sentence and orders it to be served consecutively with any future sentence to be imposed, * * * such a sentence interferes with the discretion granted the second trial judge to fashion an appropriate sentence or sentences") (quoting *State* v. *White*, 41 N.E.2d 596 (Ohio 1985)); C.J.S. *CRIMLAW* § 1524 (2005) (stating that the general rule is that "[t]he decision as to whether sentences imposed at different times shall run consecutively or concurrently should be made by the last judge imposing sentence" and citing no state exceptions).

court is in the best position to decide what sentence would be appropriate and just. As Judge Newman has explained, "[i]mposition of a consecutive sentence is strong medicine" that "should be used only after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition. * * * The length of a primary sentence is always relevant to a reasoned decision concerning both the length of a consecutive sentence and the choice of imposing it consecutively." *Salley*, 786 F.2d at 548 (Newman, J., concurring in the result); see also *Smith*, 101 F. Supp. 2d at 343 (explaining that petitioner's interpretation of Section 3584(a) "makes eminent sense, because there is no way to tell whether a pending state charge is going to result in acquittal, conviction, guilty plea, * * * or some other disposition, or what the state sentence will be * * *, and attempting to achieve a just and fair total time of confinement * * * by sequential reference to a non-existing state sentence is certainly problematic, to say the least"). Imposing a sentence consecutive to an unimposed term also allows the "second judge [to] extend the expiration date of the first judge's sentence." *Salley*, 786 F.2d at 548 (Newman, J., concurring in the result); see also *Clayton*, 921 F.2d at 493 (finding that federal sentence directed to run consecutively to unimposed state sentence "infringes upon the rights of the defendant" because it prejudices the defendant's "right to have a state court consider whether a state sentence should run concurrently with his federal sentence") (internal quotations omitted).

5. If additional guidance beyond the plain language and canons of construction were required to construe Section 3584(a), then the legislative history of the statute also indicates that the Fifth Circuit erred. The legislative history – both through what it says *and* through its silence with regard to unimposed state sentences – confirms petitioner's reading of the statute. As the Second Circuit has recognized, the legislative history indicates that the "drafters of § 3584(a) were concerned with the imposition of a federal sentence on a

defendant *already* serving either a state sentence or another federal sentence." *McCarthy*, 146 F.3d at 122 (quoting S. Rep. No. 98-225, at 126 (1983)) (emphasis added). According to the Senate Report: "[Section 3584(a)] provides that sentences to multiple terms of imprisonment may * * * be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed *while the defendant is serving another one*." *Id.* (emphasis added). The statute thus "changes the law that now applies to a person sentenced for a Federal offense *who is already serving a term of imprisonment for a State offense*." S. Rep. No. 98-225 at 126 (1983), reprinted in 1984 U.S.C.C.A.N 3182, 3309 (emphasis added). Tellingly, the discussions of consecutive sentences in the Senate Report do not mention unimposed state sentences. These discussions refer variously to "a term of imprisonment imposed on a person *already serving* a prison term," to sentences "imposed while the defendant *is serving* another one," and, as noted above, to "a person sentenced for a Federal offense who is *already serving* a term of imprisonment for a State offense." *Id.* at 126-27 (emphases added). That these discussions do not refer to unimposed state sentences, but instead frequently refer to sentences already being served, strongly suggests that the Sixth and Ninth Circuits' construction of Section 3584(a) best captures Congress's intent.

The Senate Report also specifically disapproved the holding of *United States* v. *Segal*, 549 F.2d 1293 (CA9 1977). See S. Rep. No. 98-225 at 127 n.435. In *Segal*, the Ninth Circuit had held that a federal court could not impose a sentence that would run concurrently to an *already imposed* state sentence. 549 F.2d at 1301. Section 3584(a) was thus enacted to give federal courts the power to impose a sentence concurrent with an already imposed state sentence. It is therefore contrary to the legislative history of the statute and a violation of the principle of comity to construe Section 3584(a) to mean that Congress simultaneously granted federal

courts the power to impose concurrent sentences relative to already imposed state sentences and interfered with the power of state courts to do exactly the same thing. Cf. *Younger* v. *Harris*, 401 U.S. 37, 44 (1971) ("["Our Federalism" represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."). Not surprisingly, the circuits adopting the more expansive reading of the statute ignore this history.

Thus, the legislative history indicates that Congress intended precisely what the plain meaning of the statute states. Congress certainly did not intend to strip state courts of the power to order concurrent sentences, much less implement a broad delegation of quasi-judicial authority to the BOP.[17]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or, in the alternative, granted together with the petition in No. 05-454, *Cox* v. *United States*.

Respectfully submitted,

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[17] To the contrary, because the predecessor statutes precluded federal courts from ordering a consecutive or concurrent sentence, authority to determine whether a sentence should be served consecutively or concurrently to an *already* imposed sentence rested with the BOP. *United States* v. *Fuentes*, 107 F.3d 1515, 1519 n.6 (CA11 1997); *Cozine*, 15 F. Supp. 2d at 1004 n.2; see also S. Rep. No. 98-225, at 129. Thus, the enactment of Sections 3584(a) and 3585(a) served to limit the discretion of the BOP in connection with concurrent or consecutive sentences.

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December 23, 2005

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-10987 Summary Calendar

DOUGLAS EDWIN PIERCE,
Petitioner-Appellant,

v.

L E FLEMING, Warden,
Federal Medical Center Fort Worth,
Respondent-Appellee.

October 14, 2005, Filed

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:04-CV-357-A.

For DOUGLAS EDWIN PIERCE, Petitioner - Appellant, Pro se, Federal Medical Center, Fort Worth, TX.

For L E FLEMING, Warden, Federal Medical Center Fort Worth, Respondent - Appellee: Tami C Parker, US Attorney's Office, Northern District of Texas, Fort Worth, TX.

Before KING, Chief Judge, and SMITH and GARZA, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Douglas Edwin Pierce, federal prisoner #03473-180, appeals the district court's denial of his 28 U.S.C. § 2241 petition, in which he contended that the Bureau of Prisons (BOP) incorrectly calculated his federal sentence.

Pierce contends that the district court erred when it concluded that some of his claims were unexhausted. He also argues that the district court erred when it determined that his federal sentence was to run consecutively to a subsequently imposed state sentence and that the district court erred when it determined that the BOP properly credited his sentence for time served.

Pierce argues that the BOP's method of calculating his sentence resulted in prejudice, because a state sentence for various state offenses, imposed after his federal conviction, was calculated in a manner that was inconsistent with the assumptions set forth in the BOP's calculation of his federal sentence. Pierce argues that, based on the BOP's calculation of his sentence, the state failed to credit him for the correct amount of time and his release from state prison was delayed. The record does not indicate that these issues were raised in the administrative proceedings. Therefore, the district court did not abuse its discretion when it determined that Pierce failed to exhaust administrative remedies with respect to these issues. See *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994).

Pierce argues that his federal sentence should have included the time that he was held in federal prison pursuant to a writ of habeas corpus ad prosequendum because his federal sentence should have been treated by the BOP as a concurrent sentence. The sentencing court had the discretion to order that a federal term of imprisonment run either consecutively to or concurrently with an anticipated, but not yet imposed, state sentence. *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991); 18 U.S.C. § 3584(a). The respondent submitted unrefuted evidence with its summary judgment motion that indicated that the federal sentencing court intended for the sentence to run consecutively to his

state sentence. The district court therefore did not commit error when it concluded that the BOP properly treated Pierce's federal sentence as a sentence that was to run consecutively to his state sentence.

Additionally, the fact that the state court ordered the state sentence to run concurrently with the federal sentence does not change the consecutive nature of the federal sentence. Federal authorities are not bound by sentencing orders from state courts. *See Leal v. Tombone*, 341 F.3d 427, 429 n.13 (5th Cir. 2003). Finally, because the record indicates that the time that Pierce spent in federal custody pursuant to a writ of habeas corpus ad prosequendum was credited against his state sentence, the BOP correctly applied 18 U.S.C. § 3585(b)(2) when it did not include this time as a credit towards Pierce's federal sentence. *See Vignera v. Attorney General of the United States*, 455 F.2d 637, 637-38 (5th Cir. 1972).

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:04-CV-357-A

DOUGLAS EDWIN PIERCE,
Petitioner,
Vs.
L.E. FLEMING, WARDEN, FMC-FORT WORTH,
Respondent.

Filed July 23, 2004

ORDER

Came on consideration the petition of Douglas Edwin Pierce pursuant to 28 U.S.C. § 2241 for writ of habeas corpus. The court, having considered the motion, the response, petitioner's traverse and respondent's reply thereto, the record, and applicable authorities, finds that the petition should be denied.

Petitioner alleges that he has not received proper credit for time spent in state custody prior to federal custody. He alleges that he is entitled to an additional 652 days' credit. For the reasons discussed in the response[1] and reply to petitioner's traverse, the petition is without merit. The record reflects that petitioner has received proper credit for time served. As respondent notes, the grounds raised in petitioner's traverse were not raised during the administrative process and cannot be raised now. Moreover, and in any

[1] In response to the petition, respondent filed both a motion for summary judgment and a motion to dismiss. The discussion to which the court refers is contained in respondent's motion to dismiss, with memorandum brief.

event, the allegation that petitioner did not receive credit in the state system for time served is belied by the record. Therefore,

The court ORDERS that the petition in this action be, and is hereby, denied.

SIGNED July 23, 2004.

_____/s/_____
JOHN McBRYDE
United States District Judge

(3)

Supreme Court, U.S.
FILED
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No. 05-826

In the Supreme Court of the United States

DOUGLAS EDWIN PIERCE, PETITIONER

v.

COLE JETER, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in refusing to set aside the determination by the Bureau of Prisons that petitioner was not entitled to credit against his federal sentence for time he spent in state custody, where credit for that time had been awarded by the State against petitioner's state sentence.

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In the Supreme Court of the United States

No. 05-826

DOUGLAS EDWIN PIERCE, PETITIONER

v.

COLE JETER, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted in 150 F. App'x 344. The order of the district court (Pet. App. 4a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2005. The petition for a writ of certiorari was filed on December 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2004, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241, arguing that the Bureau of Prisons (BOP) had erroneously failed to

grant him credit for time spent in state custody. Gov't C.A. Br. 2. The district court denied his petition, Pet. App. 4a-5a, and the court of appeals affirmed, *id.* at 1a-3a.

1. On January 25, 2000, petitioner was arrested on state charges for engaging in organized crime and conspiring to manufacture methamphetamine. Sixteen days later, he was released on bail. On April 8, 2000, state authorities arrested him for bail jumping and failure to appear, and his bond was revoked. On January 17, 2001, while still awaiting prosecution on the state charges, petitioner was transferred into federal custody, on the basis of a writ of habeas corpus ad prosequendum, pending his trial on federal drug charges. App., *infra*, 2a; Gov't C.A. Br. 4.

Petitioner eventually pleaded guilty in the United States District Court for the Western District of Texas to conspiring to manufacture methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. On January 3, 2002, the federal district court sentenced him to 78 months of imprisonment, to be followed by five years of supervised release. App., *infra*, 2a-3a; Gov't C.A. Br. 4-5. The federal judgment and commitment order was silent on the relationship between the federal sentence and any future state sentence. App., *infra*, 15a; Pet. 2.

On February 13, 2002, petitioner was returned to state officials. In state court, petitioner pleaded guilty to bail jumping, and the State dismissed the drug charges against him. Pet. 2-3; Gov't C.A. Br. 4-5. On February 21, 2002, the state court sentenced petitioner to three years of imprisonment, to be served concur-

rently with his federal sentence. App., *infra*, 3a; Gov't C.A. Br. 5; Pet. C.A. Br. Exh. H (state judgment).[1]

2. On June 28, 2002, petitioner was paroled from his state sentence directly to the U.S. Marshals Service for commencement of his federal sentence. Pursuant to 18 U.S.C. 3585(b) and BOP *Program Statement 5880.28, Sentence Computation Manual CCCA*, BOP credited petitioner with 33 days that he was in state custody before his federal sentencing because those days had not otherwise been credited against another sentence.[2] BOP did not credit petitioner for any of the other time

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[1] The state court judgment notes that the terms of the plea agreement include that "[s]entence to run concurrent with any federal sentence, *as applicable*." Pet. C.A. Br. Ex. H, at 2 (emphasis added). The judgment similarly states that the sentence shall be concurrent "if applicable" in its description of the terms of the punishment, *id.* at 3, although in the concluding paragraph it states simply that "Sentence to run concurrent with federal sentence," *ibid.*

[2] Section 3585 provides:

Calculation of a term of imprisonment

(a) COMMENCEMENT OF SENTENCE.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

he served on his state sentence. App., *infra*, 2a-4a; Gov't C.A. Br. 5.

On October 3, 2002, as part of its process to determine how much credit to afford petitioner for his time in state custody, BOP contacted the Texas Department of Criminal Justice to determine the amount of credit petitioner received on his state sentence. See App., *infra*, 3a-4a, 10a-11a. On October 7, 2002, BOP received information from the State indicating that petitioner received credit on his state sentence from April 24, 2000, until his parole to federal authorities on June 28, 2002. See *id.* at 12a-13a. On May 29, 2003, BOP also contacted the Probation Office in the Western District of Texas to seek the views of the federal sentencing court with respect to the operation of petitioner's federal sentence in relation to his state sentence. See *id.* at 3a, 14a-17a.[3] By letter dated June 20, 2003, the Probation Office informed BOP that "[t]he Court

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[3] Under BOP *Program Statement 5160.05*, "[a] designation for concurrent service of sentence will be made only when it is consistent with the intent of the federal sentencing court or the goals of the criminal justice system." Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05*, at 4 (2003). The Program Statement further provides that information that the BOP will consider in making that determination includes the "intent of the federal sentencing court, if available." *Ibid.* When an inmate makes a request for pre-sentence credit toward a federal sentence for time spent in service of a state sentence, the Program Statement provides that "[i]n making the determination, if a designation for concurrent service may be appropriate (e.g., the federal sentence is imposed first and there is no order or recommendation regarding the service of the sentence in relationship to the yet to be imposed state term), the [BOP] will send a letter to the sentencing court (either the Chambers of the Judge, U.S. Attorney's Office, and/or U.S. Probation Office, as appropriate) inquiring whether the court has any objections." *Id.* at 6.

wishes this inmate's sentence to run consecutive to his State sentence." *Id.* at 18a.

3. a. Beginning on June 28, 2003, petitioner challenged, through BOP's administrative review process, BOP's decision not to credit him with 652 days that he spent in state custody. See App., *infra*, 20a-28a; Pet. C.A. Br. Exh. D. He contended that he was entitled to the credit because his state judgment provided that his state sentence was to run concurrently to his federal sentence. See App., *infra*, 20a, 24a. Petitioner's appeal was denied at each level, including by the Regional Director. See *id.* at 26a-28a.

On November 14, 2003, the Regional Director explained in his decision that Section 3585(b) "authorizes credit for time spent in official detention prior to the imposition of a sentence that has not been credited against another sentence." App., *infra*, 27a. The Regional Director informed petitioner that "[a]s a result of language on your state judgment reflecting the sentence should be served concurrently with your federal sentence, institution staff contacted the U.S. Probation Officer," who contacted the sentencing judge and were "informed the court intended for your federal sentence to be served consecutively to your state sentence." *Id.* at 27a-28a. The Regional Director further noted that the State had confirmed to BOP that petitioner had received credit from the State for the time for which he sought credit. *Id.* at 27a. As such, the Regional Director explained that to award credit would be "contrary to the intent" of Section 3585(b). *Ibid.*

Nevertheless, the Regional Director indicated that BOP had considered petitioner's request as one to have BOP designate, nunc pro tunc, his state custody as the place of service of his federal sentence. App., *infra*,

27a-28a. After consideration of "the available information, consistent with Title 18 U.S.C. § 3621" and the guidance of BOP *Program Statement 5160.05*, the Regional Director stated that BOP had concluded: "In your specific case, we find commencement of your federal sentence by way of a concurrent designation is not consistent with the goals of the criminal justice system." *Id.* at 28a.[4]

In December 2003, petitioner appealed the Regional Director's decision to the BOP Central Office. See Appendix to Gov't Resp. to Pet. Traverse at 005. On February 2, 2004, the Central Office denied petitioner's appeal, stating that it "concur[red] with previous findings in that the Bureau of Prisons computed your sentence according to the applicable statutes and in accordance with Program Statement *5880.28, Sentence Computation Manual CCCA*." *Id.* at 004.

b. In May 2004, petitioner filed pro se the instant habeas corpus action under 28 U.S.C. 2241 against the warden of his institution.[5] He argued, *inter alia*, that "[c]ontrary to the p[l]ain language of 18 U.S.C. §3584(a)," respondent "has failed to properly grant prior jail credit time to Petitioner's sentence calculation and has refused to acknowledge and amend the appropriate changes." Pet. for Writ of Habeas Corpus at 3

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[4] Section 3621(b) provides in pertinent part that "[t]he Bureau of Prisons shall designate the place of the prisoner's imprisonment." 18 U.S.C. 3621(b).

[5] At the time of petitioner's administrative complaint and the initiation of this action, L.E. Fleming was the warden of petitioner's federal institution; respondent is the current warden. Gov't C.A. Br. 2 n.1.

(filed May 10, 2004).[6] In response, the government filed a motion to dismiss and a motion for summary judgment. The latter motion included a declaration and supporting documents (see App., *infra*, 1a-19a) demonstrating that petitioner received credit on his state sentence for the time at issue. The government argued that petitioner failed to state a claim for relief because, under 18 U.S.C. 3585(b), petitioner was not entitled to credit for time spent in official custody when that time had been credited against another sentence. The government also argued that the federal sentencing court had discretion, under Section 3584(a), to order that petitioner's federal sentence be served consecutively to his as-yet-unimposed sentence. See Gov't Mot. to Dismiss at 3-5.

c. In a brief Order, the district court dismissed for the reasons discussed in the government's motion to dismiss, rejecting petitioner's claim that "he has not received proper credit for time spent in state custody prior to federal custody." Pet. App. 4a-5a & n.1.

4. On appeal, petitioner, again proceeding pro se, argued that, under Section 3584(a), the federal court

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[6] Section 3584(a) provides in pertinent part:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively[.] * * * Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

18 U.S.C. 3584(a).

lacked authority to impose a federal sentence consecutive to an as-yet-unimposed state sentence. The government responded that "[t]he Attorney General, through the Bureau of Prisons (BOP), determines what credit, if any, will be awarded to prisoners for time spent in custody prior to the commencement of their federal sentences," Gov't C.A. Br. 11, and that petitioner was not entitled under Section 3585(b) to the time at issue because he already had received credit for that time from the State, *id.* at 16. In response to petitioner's argument that the state court had ordered the state sentence to run concurrently, the government contended that a state court has no authority to order how a federal sentence is computed. *Id.* at 12. The government further noted that Fifth Circuit precedent afforded the district court discretion under Section 3584(a) to run petitioner's sentence consecutively to his impending state sentence, and that, "absent language in the sentencing decision to the contrary," Section 3584 dictated that they be served consecutively. *Ibid.*

The court of appeals affirmed in a short, unpublished per curiam. Relying on *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991), cert. denied, 500 U.S. 925 (1991), and Section 3584(a), the court of appeals held that "[t]he sentencing court had the discretion to order that a federal term of imprisonment run either consecutively to or concurrently with an anticipated, but not yet imposed, state sentence." Pet. App. 2a. The court observed that "the fact that the state court ordered the state sentence to run concurrently with the federal sentence does not change the consecutive nature of the federal sentence," because federal authorities are not bound by sentencing orders from state courts. *Id.* at 3a. Finally, the court held that

"because the record indicates that the time that [petitioner] spent in federal custody pursuant to a writ of habeas corpus ad prosequendum was credited against his state sentence, the BOP correctly applied 18 U.S.C. § 3585(b)(2) when it did not include this time as credit towards [petitioner's] federal sentence." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-30) that the district court did not have the authority to direct that his sentence run consecutively to a state sentence that had not yet been imposed. According to petitioner, 18 U.S.C. 3584(a) restricts a district court's ability to impose a sentence consecutive to a state sentence to instances where the defendant "is already subject to" the state sentence. 18 U.S.C. 3584(a). Petitioner contends that the court of appeals' rejection of that interpretation conflicts with decisions of other courts of appeals.

Petitioner is correct that the courts of appeals disagree on whether a federal court has the authority to direct a sentence to be served consecutively to a yet-to-be imposed state sentence. In addition to the Fifth Circuit, the Eighth, Tenth, and Eleventh Circuits have ruled that district courts have such authority. See *United States* v. *Andrews*, 330 F.3d 1305, 1306-1307 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam); *United States* v. *Williams*, 46 F.3d 57, 58-59 (10th Cir.), cert. denied, 516 U.S. 826 (1995). The courts of appeals for the Sixth, Seventh, and Ninth Circuits have held that district courts lack that authority. *Romandine* v. *United States*, 206 F.3d 731, 738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1040 (6th Cir. 1998); *United States* v.

Clayton, 927 F.2d 491, 492 (9th Cir. 1991). This case, however, does not present that question, and in any event, resolving that conflict is unnecessary. Further review is not warranted.[7]

1. Although both parties and the lower courts framed the issue as turning in part on a court's authority under 18 U.S.C. 3584(a) to order consecutive sentences, this case does not present the question whether a district court has authority under that Section to order a federal sentence to be served consecutive to an as-yet-unimposed state sentence. Here, the district court did not even purport to do so. As petitioner concedes (Pet. 2), the federal sentence was silent on the relationship between the federal sentence and any future sentence. See App., *infra*, 15a. The question presented by the petition—"whether a federal judge can *require* a defendant to serve a term of imprisonment consecutively to another sentence that has not yet been imposed," Pet. i (emphasis added)—is therefore not presented by the facts of this case.

Properly understood, this case involves BOP's authority under 18 U.S.C. 3585 and 3621, not a sentencing court's authority under 18 U.S.C. 3584. As this Court held in *United States* v. *Wilson*, 503 U.S. 329 (1992), BOP, not the federal sentencing court, has the authority to determine how much credit a defendant should

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[7] The Court denied review of the issue in *Lackey* v. *United States*, 125 S. Ct. 2963 (2005) (No. 04-9286); *Martinez* v. *United States*, 125 S. Ct. 1299 (2005) (No. 04-7129); and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136). The same question is raised by the petition for a writ of certiorari in *Cox* v. *United States*, 125 F. App'x 973 (10th Cir.), petition for cert. pending, No. 05-454 (filed Oct. 5, 2005); and *Cruz* v. *United States* 153 F. App'x 587 (11th Cir. 2005), petition for cert. pending, No. 05-8866 (filed Jan. 10, 2006).

receive for time spent in official detention before the commencement of his federal sentence. See *id.* at 332-337 (interpreting Section 3585). That is because, "[a]fter a district court sentences a federal offender, the Attorney General, through BOP, has the responsibility for administering the sentence. *Id.* at 335 (citing 18 U.S.C. 3621(a)).

Here, as the court of appeals concluded, "BOP correctly applied 18 U.S.C. § 3585(b)(2)" when it declined to credit petitioner for the time that already had been credited against his state sentence. Pet. App. 3a. BOP also did not abuse its discretion in refusing to designate, nunc pro tunc, state custody as the place of petitioner's federal confinement. See 18 U.S.C. 3621(b). As explained in the decision of the Regional Director, BOP determined that "commencement of [petitioner's] federal sentence by way of a concurrent designation [wa]s not consistent with the goals of the criminal justice system." App., *infra*, 28a. BOP reached that conclusion after taking into account the federal sentencing court's wishes. But the letter from the Probation Office that conveyed the court's "wishes," *id.* at 18a, was not part of the judgment and commitment order, and the court had no power, 18 months after sentencing, to amend the judgment or modify the sentence. See Fed. R. Crim. P. 35(a) (limiting correction of "arithmetical, technical, or other clear error" to within seven days after sentence); see, *e.g.*, *United States* v. *Penna*, 319 F.3d 509, 512 (9th Cir. 2003) ("The district court must correct a sentence within seven days after orally pronouncing it or else it loses its jurisdiction to modify the sentence."). The Regional Director's decision (App., *infra*, 26a-28a) and BOP's relevant Program Statement (see note 3, *supra*) make clear that, while the court's intentions are an im-

portant consideration, they are only one of the considerations taken into account in making a designation decision under Section 3621(b).[8]

The circuits appear to agree that BOP has broad discretion to determine whether to allow a federal inmate to serve his federal time in state custody. See *Romandine*, 206 F.3d at 738-739 (agreeing with the Second and Third Circuits that that the Attorney General has discretion under Section 3621 effectively to run sentences concurrently by designating the state institution as the place for service of the federal sentence); see also *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75-76 (2d Cir. 2005); *Taylor* v. *Sawyer*, 284 F.3d 1143, 1147-1150 (9th Cir. 2002), cert. denied, 537 U.S. 1119 (2003); *Barden* v. *Keohane*, 921 F.2d 476, 483-484 (3d Cir. 1990).[9] Petitioner, in any event, does not challenge BOP's exercise of discretion; rather he seeks to challenge only action by the federal sentencing court. Because this case actually concerns BOP's refusal to allow petitioner credit for time in state custody for which he already received time under his state sentence, rather than any order by a district court made under Section

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[8] To the extent that language in the warden's earlier administrative decision (App., *infra*, 23a), or the government's briefs in the lower courts, suggests that the district court's indirect expression of its "wishes" was somehow a binding order on BOP, that was incorrect. The warden's decision, moreover, was not BOP's final word, and the Regional Director's decision did not rely on Section 3584. See App., *infra*, 26a-28a.

[9] Although the Second Circuit has suggested that *Romandine* disagreed on this score, see *Abdul-Malik*, 403 F.3d at 75-76, that cannot be squared with *Romandine*. See *Romandine*, 206 F.3d at 738-739 (noting that it agreed with the Second Circuit's "bottom line" that "[t]he Attorney General has discretion" to decide when to start the federal sentence by designating the place of service).

3584, the question raised by petitioner is not at issue here.

2. In any event, resolving whether district courts have the power to impose a sentence that is to run consecutively to an as-yet-unimposed state sentence is unnecessary because a district court's order that a defendant's sentence be served consecutively to future state sentences is not binding on state courts. This Court has long recognized that although federal and state courts "co-exist in the same space, *they are independent*, and have no common superior." *Ponzi* v. *Fessenden*, 258 U.S. 254, 261 (1922) (quoting *Covell* v. *Heyman*, 111 U.S. 176, 182 (1884)) (emphasis added). "[O]ur federal system is one of 'dual sovereignty,' and not one in which the Supremacy Clause controls sentencing." *Taylor* v. *Sawyer*, 284 F.3d at 1150 (quoting *Strand* v. *Schmittroth*, 251 F.2d 590, 605 (9th Cir.), cert. dismissed, 355 U.S. 886 (1957)). Each sovereign has "full power to set punishment for crimes against the * * * sovereign" unconstrained by the other sovereign. 284 F.3d at 1151. Consequently, "a determination as to concurrence of sentence made by one sovereign does not bind the other." *Jake* v. *Herschberger*, 173 F.3d 1059, 1065 (7th Cir. 1999). Thus, as a general matter, neither state courts nor state prison systems are bound by federal court orders concerning consecutive or concurrent sentencing. Cf. Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05*, at 3 (2003) ("Just as the federal government has no authority to prescribe when a state sentence will commence, the state has no authority to order commencement of a federal sentence."); cf. *United States* v. *Gonzalez*, 520 U.S. 1, 11 (1997) (in a case involving consecutive sentence under 18 U.S.C. 924(c)(1), which then

provided that no term of imprisonment imposed under it "shall * * * run concurrently with any other term of imprisonment," reserving the question "whether a later sentencing state court is bound to order its sentence to run consecutively to the [18 U.S.C.] § 924(c) term of imprisonment").

States may make their sentences concurrent to federal sentences if a defendant is in primary federal custody by designating the defendant's federal institution for service of the state sentence. If a defendant is in primary state custody, the state court can make the state sentence effectively concurrent to a subsequent federal sentence by deducting the length of the federal sentence from the time spent (or to be served) in the state system at sentencing, or by suspending a portion of the sentence. In addition, a defendant in state custody, a state court, or a state prison system can seek to have the Bureau of Prisons designate the state facility as the place for service of his federal sentence. See *Program Statement No. 5160.05*, *supra*, at 4-7.[10]

Petitioner disputes (Pet. 13-17) the effectiveness of such measures and argues that they require state courts to engage in unseemly maneuvers to effectuate their sentencing intentions, which is asserted to be an affront to "important sovereign interests of state crimi-

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[10] Here, petitioner claims (Pet. 15) that, because the federal sentence was silent on its effect on any future sentence, "the state court had no reason to believe that it was required to reduce its sentence * * * in order to ensure that its intent was effectuated." But BOP's Program Manual clearly states, with respect to subsequently-imposed state sentences, that "[i]f the federal sentence is silent * * * then the federal sentence shall not be placed into operation until the U.S. Marshals' Service or the Bureau of Prisons gains exclusive custody of the prisoner." BOP *Program Statement 5880.28*, at 1-32A.

nal justice systems." Pet. 13. But the interplay of state and federal sentencing intentions simply reflects the fact that each sovereign is entitled to decide whether its punishment should be cumulative of the other's. Here, the federal district court expressed its "wishes," through a letter from the Probation Office to BOP, that the federal sentence should be consecutive to petitioner's state sentence. BOP considered that intention in deciding that it was not "consistent with the goals of the criminal justice system," App., *infra*, 28a, to credit petitioner's sentence for his federal drug conviction with time he served on his state bail-jumping conviction. The federal government should not be required to surrender its independent judgment about the proper extent of a defendant's federal punishment, and reduce the length of federal imprisonment, in order to abide by the terms of the plea agreement that petitioner made with the State and that the state court accepted.

In sum, the disagreement over whether federal courts have the legal power to provide that a federal sentence shall run consecutively to a future state sentence does not have sufficient practical importance to warrant this Court's review. Even if it did, the Court should await a case where the issue is presented by the facts of the case, unlike this one where it is not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
LOUIS M. FISCHER
Attorney

APRIL 2006

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:04-CV-357-A

DOUGLAS EDWIN PIERCE, PETITIONER

v.

L. E. FLEMING, WARDEN

DECLARATION OF JAMES E. HAZELTON

In accordance with the provisions of § 1746 of Title 28, United States Code, I, the undersigned, James E. Hazelton, do hereby make the following declaration, under penalty of perjury to the above-styled and numbered cause:

1. I am presently employed by the United States Government as the Inmate Systems Manager for the Federal Medical Center (FMC) located in Fort Worth, Texas. I have held this position since May 1998. The official duties and responsibilities of my current position include Official Custodian of Records for all inmates incarcerated at FMC Fort Worth. In this respect, I monitor inmates' files to ensure and verify that accurate sentence computations are performed. Pursuant to my official responsibilities, I have access to

records maintained in the ordinary course of business by the Federal Bureau of Prisons, including records reflecting an inmate's sentencing data.

2. Petitioner, Douglas Edwin Pierce, Register No. 03473-180, is a 34-year-old inmate currently serving a 78-month term of imprisonment with a five-year term of supervision for Conspiracy to Manufacture Methamphetamine in violation of 21 U.S.C. §§ 841 and 846. Petitioner was sentenced on January 3, 2002, in the United States District Court for the Western District of Texas. He is currently projected to satisfy this sentence on February 16, 2005, via Good Conduct Time Release. **See attached Exhibit "A" Sentry[1] Sentence Monitoring Computation Data.**

3. Petitioner was received at FMC Fort Worth on October 4, 2002, and remains here at present. In the petition, the petitioner seeks 652 days of federal custody credit. Petitioner was arrested on January 25, 2000, by the Hill County Sheriff's Department for Engaging in Organized Crime and Conspiracy to Manufacture Methamphetamine. He remained in jail until his release on bail on February 10, 2000. **See attached Exhibit "B" letters dated October 3, and October 7, 2002.** Petitioner was credited for 17 days of federal confinement for those days. On April 8, 2000, Petitioner was arrested for Bail Jumping and Failure to Appear by the Hill County, Texas law enforcement authorities. On January 17, 2001, the petitioner was transferred to the custody of the United States Marshals Service on the basis of a Writ of Habeas Corpus Ad Prosequendum for his federal court appearance. The petitioner was

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[1] Sentry is the Bureau of Prisons computerized inmate record-keeping system.

sentenced in the Western District of Texas on January 3, 2002, to 78 months incarceration for Conspiracy to Manufacture Methamphetamine. After sentencing, the petitioner was returned to the state and received a three-year sentence. On or about February 17, 2002, petitioner received a three-year sentence for his state offenses. The petitioner was paroled from his state sentence on June 28, 2002, to the U.S. Marshals Service for service of his sentence.

4. The petitioner states the state judge ordered his state sentence be run concurrent with his federal sentence. The U.S. Probation Office, Western District of Texas, was contacted to determine the Honorable Walter S. Smith's, Jr., U.S. District Judge, intention as far the operation of the petitioner's federal sentence relative to his state sentence. **See attached Exhibit "C"** correspondence dated May 29, 2003. In correspondence, dated June 20, 2003, U.S. Probation stated it was the court's intention the petitioner's federal sentence run consecutive to his state sentence. **See attached Exhibit "D"**

5. The petitioner states he should be awarded additional prior custody credits on his federal sentence from April 24, 2000 through January 2, 2003. 18 U.S.C. § 3585(b) and Bureau of Prisons Program Statement 5880.28, *Sentence Computation Manual CCCA* furthers defines prior custody as official detention that is a result of the instant federal offense or any other period of detentions that occur on or after the date of the federal offense and prior to commencement of the sentence and has not been credited to another sentence. Information was received from the Texas Department of Criminal Justice indicating the petitioner received credit on his state sentence from April 24, 2000, until

his parole on June 28, 2002. The arrest of the petitioner on April 8, 2000, was a not a result of the instant federal offense. However, credit was awarded from April 8, 2000, to April 23, 2000, (16 days of federal custody credit) on the petitioner's federal sentence in accordance with 18 U.S.C. § 3585(b) and Bureau of Prisons Program Statement 5880.28, *Sentence Computation Manual CCCA*. Petitioner received 33 days of prior custody credit.

6. As custodian of inmate records at FMC Fort Worth, I certify that the report titled Sentence Monitoring Computation Data attached here to as Exhibit C is a true and correct copy of that report for the petitioner. I also certify that his release date calculated as February 16, 2008, is correct and computed in accordance with Bureau of Prisons Program Statement 5880.28 and Title 18 U.S.C. § 3568.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of June 2004.

/s/ JAMES E. HAZELTON
JAMES E. HAZELTON
Inmate Systems Manager
Federal Medical Center
3150 Horton Road
Fort Worth, Texas 76119-5996

EXHIBIT A

FTWSV 540*23 * SENTENCE MONITORING * 06-21-2004
PAGE 001 * COMPUTATION DATA * 13:13:18
AS OF 06-21-2004

REGNO..: 03473-180 NAME: PIERCE, DOUGLAS EDWIN

FBI NO .....: 348023NB1 DATE OF BIRTH: 08-03-1969
ARS1 .....: FTW/A-DES
UNIT .....: SAN QUARTERS ...: S04-081L
DETAINERS ....: NO NOTIFICATION: YES

PRE-RELEASE PREPARATION DATE: 08-16-2007

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S CURRENT COMMITMENT.
THE INMATE IS PROJECTED FOR RELEASE: 02-16-2008 VIA GCT REL

-------CURRENT JUDGMENT/WARRANT NO: 010 -------

COURT OF JURISDICTION .....: TEXAS, WESTERN DISTRICT
DOCKET NUMBER .....: W-01-CR-006(01)
JUDGE .....: SMITH
DATE SENTENCED/PROBATION IMPOSED : .....: 01-03-2002
DATE COMMITTED .....: 10-04-2002
HOW COMMITTED...: US DISTRICT COURT COMMITMENT
PROBATION IMPOSED .....: NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	$100.00	$00.00	$2,000.00	$00.00

RESTITUTION . . : PROPERTY: NO SERVICES: NO
AMOUNT: $00.00

----------CURRENT OBLIGATION NO: 010----------
OFFENSE CODE . . . . : 391

OFF/CHG: 21:846,841 CONSPIRACY TO MANUFACTURE METHAMPHETAMINE - CT S1

SENTENCE PROCEDURE . . . . . : 3559 PLRA SENTENCE
SENTENCE IMPOSED/TIME TO SERVE. : 78 MONTHS
TERM OF SUPERVISION . . . . . : 5 YEARS
CLASS OF OFFENSE . . . . . : CLASS B FELONY
DATE OF OFFENSE . . . . . : 01-31-2000

FTWSV 540*23 SENTENCE MONITORING * * 06-21-2004
PAGE 002 COMPUTATION DATA * 13:13:18
AS OF 06-21-2004

REGNO..: 03473-180 NAME: PIERCE, DOUGLAS EDWIN

----------CURRENT COMPUTATION NO: 010----------

COMPUTATION 010 WAS LAST UPDATED ON 11-26-2002
AT FTW AUTOMATICALLY

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS
ARE INCLUDED IN CURRENT COMPUTATION 010: 010 010

DATE COMPUTATION BEGAN.....: 06-28-2002
TOTAL TERM IN EFFECT.....: 78 MONTHS
TOTAL TERM IN EFFECT CONVERTED....: 6 YEARS 6 MONTHS
EARLIEST DATE OF OFFENSE.....: 01-31-2000

JAIL CREDIT.....:	FROM DATE	THRU DATE
	01-25-2000	02-10-2000
	04-08-2000	04-23-2000

TOTAL PRIOR CREDIT TIME.....:	33
TOTAL INOPERATIVE TIME.....:	0
TOTAL GCT EARNED AND PROJECTED....:	282
TOTAL GCT EARNED.....:	81
STATUTORY RELEASE DATE PROJECTED:	02-16-2008
SIX MONTH / 10% DATE.....:	N/A
EXPIRATION FULL TERM DATE.....:	11-24-2008
PROJECTED SATISFACTION DATE.....:	02-16-2008
PROJECTED SATISFACTION METHOD....:	GCT REL

REMARKS . . . . . .: AWARDED JAIL CREDIT WAS NOT APPLIED TO STATE SENTENCE. INMATE WAS RELEASED BY PAROLE, 06-28-2002 TO US MARSHALS TO BEGIN HIS FEDERAL SENTENCE.

G0002 MORE PAGES TO FOLLOW . . . . . .

FTWSV 540*23 * SENTENCE MONITORING * 06-21-2004
PAGE 003 OF 003 * COMPUTATION DATA * 13:13:18
AS OF 06-21-2004

REGNO..: 03473-180 NAME: PIERCE, DOUGLAS EDWIN

-------- ----------CURRENT NOTIFIES: ----------

NOTIFY.....:	001
DATE RECEIVED.....:	09-30-2002
AUTHORITY..... :	TEXAS DEPARTMENT OF CRIMINAL JUSTICE
ADDRESS.....:	8610 SHOAL CREEK BLVD AUSTIN, TX 78711
PHONE NUMBER.....:	(512) 406-5356
REMARKS.....:	SUPERVISION ONLY UNTIL 04-24-2003 (TDCJ# 01084005)

G0000 TRANSACTION SUCCESSFULLY COMPLETED

EXHIBIT B

U.S. Department of Justice
Federal Bureau of Prisons
Federal Medical Center

3150 Horton Road
Fort Worth , Texas 76119

October 03, 2002

Hill County Sheriff's Department
Attn: Jail Records/ Booking
218 N. Waco
Hillsboro, Texas 76645

URGENT-PLEASE RESPONSE

RE: Inmate: PIERCE, DOUGLAS E.
Register Number: 03473-180
Case Number: 31,612
DOB: 08-03-1969 W/M
FBI#348023NBI
SSN: [redacted]

Charge: Engaging in Organized Crime – Conspiracy to manufacture methamphetamine

To Whom It May Concern:

The above-named individual is currently incarcerated at the Federal Medical Center, Fort Worth, Texas. In light of recent court decisions, the Attorney General is required to credit time spent in non-federal custody as jail time towards federal sentences in certain situations. In order to make an accurate determination on whether the above mentioned

inmate would be entitled to credit on his federal sentence for time spent in your custody, the following information is requested.

Dates of arrest/custody: Since January 2000 and/or after
(Beginning & Ending) If possible, please answer request and send a booking sheet also.

Length of time in your custody/date of release: See Attached Letter

Name of agency for which inmate was detained Hill County

Charge(s) Engaging in Organized Crime

Were date(s) credited to your sentence or given time served: No

(How much time credited)____

Was bail set?_____ If yes, date of release?_____

Type of Rel._____

Disposition of your charge: Filed Federally

(What is the status)

Date Federal detainer was filed:_____

Thank you for your assistant in this matter. If additional information is needed, please contact the Records Office at (817) 413-3054 (direct line) or 534-8400, ext. 3054. Please fax your response to (817) 413-3327.

Sincerely,

/s/ ALICE F. ROSS, LIE
for James E. Hazelton
Inmate Systems Manager

Verifying Official's Signature/Date
/s/ KATINA M. CASTRO
KATINA M. CASTRO

HILL COUNTY SHERIFF'S OFFICE

Brent Button, Sheriff

P.O. Box 283 Hillsboro, Texas 76645

October 7, 2002
Federal Medical Center
3150 Horton Road
Ft. Worth, Texas 76119

Attn: Alice F. Ross
Legal Instruments Examiner

Re: Inmate: Pierce, Douglas E.
Register # 03473-180

Dates in Custody Hill County Jail:

01-25-00 – 02-10-00	17 Days	
04-08-00 – 01-17-01	285 Days	
02-13-02 – 02-27-02	26 Days	On 02-13-02 Pierce was brought back to Hill County from Federal to take care of Bail Jumping and Failure to Appear charge was released to TDCJ on 02-27-02.
Total Days:	328 Days	

Pierce is not wanted by this agency.

Sincerely,

/s/ KATINA M. CASTRO
KATINA M. CASTRO
Warrants Division

Communications (254) 582-5313
Criminal Investigation Division
(254) 582-2153

Jail (254) 582-3878

Fax (254) 582-3848

EXHIBIT C

U.S. Department of Justice
Federal Bureau of Prisons
Federal Medical Center

3150 Horton Road
Fort Worth, Texas 76119

May 29, 2003

Melissa Suniga
Senior U.S. Probation Officer
Western District of Texas
Waco, Texas

RE: PIERCE, Douglas Edwin
Reg. No. 03473-180
Case Number: W-01-CR-006(0l(

Dear Ms Suniga:

Mr. Pierce, Douglas is currently serving a 78-month term of imprisonment in the Federal Medical Center, at Fort Worth, TX. He has requested a nunc pro tunc designation which would allow his federal sentence to be served concurrently with his state sentence.

Mr. Pierce was originally arrested by State of Texas law enforcement officials. Mr. Pierce was sentenced to a 3-year term in the Texas Department of Criminal Justice. He was produced in the Western District of Texas on the basis of a Writ of Habeas Corpus Ad

Prosequendum. On January 3, 2002, Mr. Pierce was sentenced in federal court to 78- months imprisonment for Conspiracy to Manufacture Methamphetamine. The Court did not specify whether the federal sentence should be served concurrently or consecutively with his state sentence. After sentencing, Mr. Pierce was returned to state custody. On June 28, 2002, Mr. Pierce was paroled from the State of Texas and his federal sentence commenced.

In accordance with the Bureau of Prisons Program Statement 5160.03, Designation of State Institution for Service of Federal Sentence, and Title 18 U.S.C. 3584, "if multiple terms of imprisonment are imposed at different times (emphasis added) without the judge specifying whether they are to run concurrently or consecutively, they will run consecutively unless the statute specifies otherwise."

SENSITIVE - LIMITED OFFICIAL USE

In addition, any decision concerning concurrent or consecutive service of a federal sentence with a state sentence is not dependent on the order of which sentence is imposed first. Since the federal judgment and commitment order is silent and state authorities had primary jurisdiction over Mr. Pierce, the federal sentence will be served consecutive to the state sentence.

The federal sentencing judge may order the federal sentence to run consecutive to a state sentence to be imposed. The Bureau of Prisons interprets Title 18 U.S.C. 3584 to also permit the federal judge to order concurrent service with a state sentence. To allow the federal sentence to commence, the Bureau of Prisons designates the state correctional institution for service of the federal sentence. This designation is made effec-

tive nunc pro tunc to the date of federal sentencing. This decision is not dependent upon whether a state sentence has been imposed or will be imposed in the future.

Currently, Mr. Pierce's federal sentence has been computed to commence on June 28, 2002, the date he was released from the State of Texas. However, Mr. Pierce has requested a nunc pro tunc designation to commence his federal sentence on January 3, 2002, the date of federal sentencing.

As a result of the decision in Barden v. Keohane, 921 F.2d 476 (3rd Cir. 1990), the Bureau of Prisons considers an inmate's request for presentence credit toward a federal sentence, for time spent in service of a state sentence, as a request for a nunc pro tunc designation. The Court in Barden held that the Bureau must consider an inmate's request for concurrent service of the state and federal sentences.

Pursuant to our program statement, a designation for concurrent service of sentence should be made only when it is consistent with the intent of the sentencing federal court, or with the goals of the criminal justice system. Therefore, our office is seeking your assistance in bringing this matter before the Court. If the Court wishes for Mr. Pierce's federal sentence to commence on January 3, 2002, we ask that you please forward a letter or amended order to our office.

We have enclosed Mr. Pierce's Judgment and Commitment Order for your information. If you have any questions or concerns, please do not hesitate to contact James E. Hazelton, Inmate Systems Manager, at (817) 413-3051.

Your assistance in this matter is appreciated.

Sincerely,

/s/ JAMES E. HAZELTON
JAMES E. HAZELTON
Inmate Systems Manager

EXHIBIT D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS
PROBATION OFFICE

[SEAL OMITTED]

June 20, 2003

WACO

James E. Hazelton
Inmate Systems Manager
Federal Medical Center
3150 Horton Road
Ft. Worth, Texas 76119

RE: PIERCE, Douglas Edwin
Dkt. #W-01-CR-006(01)
Reg. #03473-180
Concurrent/Consecutive Sentencing

Dear Mr. Hazelton:

The Court reviewed the request to have the above-named inmate's sentence amended to run concurrently with his State sentence.

After careful consideration by the Court, the request for concurrent sentencing was denied. The Court wishes this inmate's sentence to run consecutive to his State sentence.

Sincerely,

/s/ MELISSA SUNIGA
MELISSA SUNIGA
Senior U.S. Probation Officer

ZMS/dt

cc: Douglas Edwin Pierce
Register #03473-180
Federal Medical Center
P.O. Box 15330
Ft. Worth, Texas 76119

cc: Joe Sanchez, ADCUSPO, Austin, TX

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

REQUEST FOR
ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Douglas Edwin Pierce 03473-180 San Antonio FMC-Ft. Worth
LAST NAME, FIRST, MIDDLE INITIAL REG NO UNIT INSTITUTION

Part A - INMATE REQUEST

Pursuant to my initial computation data time sheet I was credited 652 days towrds [*sic*] my current sentence for my state sentence because the state Judgment and Committment [*sic*] Order specified my state sentence was to run concurrently to my Federal sentence. Subsequently on 6-11-03 the records department, without explanation, removed and denied the 652 days credit thus deeming my new projected release date as being that of 2-16- 2008 as opposed to 11-18-2005 as stated in the initial computation sheet. I am requesting that I be re-granted the 652 days against my sentence.

8-11-03 /s/ DOUGLAS E. PIERCE
DATE SIGNATURE OF REQUESTER

Part B - RESPONSE

[Revd: 8/13/03]

8-25-03 /s/ L. E. FLEMING
DATE WARDEN OF REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

FIRST COPY: WARDEN'S ADMINISTRATIVE REMEDY FILE

CASE NUMBER: *307637-F1*

CASE NUMBER: *307637-F1*

Part C - RECEIPT

Return to: _____ _____ ____ _____

LAST NAME, FIRST, MIDDLE INITIAL — REG. NO — UNIT — INSTITUTION

SUBJECT _____

8/13/03 _____

DATE — RECIPIENT'S SIGNATURE (STAFF MEMBER)

PIERCE, Douglas REG. NO.: 03473-180

FILED: 08-13-2003

REMEDY NO. 307637-F1 PART B - RESPONSE

This is in response to your Request for Administrative Remedy, dated August 11, 2003, wherein you request your federal sentence to run concurrent with your state sentence and to be granted 652 days for service of a state sentence as ordered by the state Judgment and Commitment Order.

An investigation was conducted and found on May 29, 2003, the U.S. District Court for the Western District of Texas, was contacted to determine if the Court had any objections to your federal sentence running concurrent with your state sentence. This inquiry was based on your state sentence being ordered to run concurrent with your federal sentence and your request to Inmate Systems Management staff. On June 22, 2003, a letter was received from the U.S. District Court for the Western District of Texas stating it was the Court's wish for your federal sentence to run consecutive to your state sentence. Based on the Court's wishes, your sentence was computed to show a start date of June 28, 2002, when you were released from state custody. You cannot receive credit from April 24, 2000, to January 2, 2003, as the state awarded this credit to your state sentence. As outlined in Program Statement 5880.28, Sentence Computation Manual (CCCA of 1984), Title 18 U.S.C. 3585(b) is the statute authorizing the award of presentence credit. This statute authorizes credit for time spent in official detention prior to the imposition of

a sentence that has not been credited against another sentence. To award credit that was applied to your state sentence would be contrary to the intent of this statute. You cannot obtain relief under Willis v. U.S., 449 F2d 923(CA 5, 1971) because your federal sentence was specifically ordered to be consecutive to your state sentence.

Based on the above information, your request is denied.

If you are not satisfied with this decision, you may appeal to the Regional Director at Bureau of Prisons, South Central Region, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219, via a BP-230(13). Your appeal must be received in the South Central Regional Office within 20 days of the date of this response.

/s/ L. E. FLEMING — *8-25-03*

L. E. FLEMING, Warden — Date

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

REGIONAL ADMINISTRATION
REMEDY APPEAL

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From: Pierce Douglas E. 03473-180 SAN FMC-Ft. Worth
LAST NAME, FIRST, MIDDLE INITIAL REG NO UNIT INSTITUTION

Part A - REASON FOR APPEAL *Pursuant to my initial computation data time sheet I was credit 652 days towrds [sic] my current sentence for my state sentence because the state Judgement and Committment [sic] order specified my state sentence was to run concurrently to my Federal sentence. Subsequently on 6-11-03 the records department, without explanation, received and denied the 652 days credit thus deeming my new projected release date as being that of 2-16-2008 as opposed to 11-18-2005 as stated in the initial. I am requesting that I be re-granted the 652 days against my sentence.*

7-13-03 /s/ DOUGLAS E. PIERCE
DATE SIGNATURE OF REQUESTOR

Part B - RESPONSE

[Seal Omitted]

DATE REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

THIRD COPY WARDEN'S ADMINISTRATIVE REMEDY FILE

CASE NUMBER: *307637-R1*

Part C – RECEIPT

CASE NUMBER _____

Return to: _____ _____ ____ _____

LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT _____

_____ _____

DATE — RECIPIENT'S SIGNATURE (STAFF MEMBER)

PIERCE, Douglas Edwin REG. NO. 03473-130

RECEIPTED: 09-18-03

CASE NO. 307637-R1 PART B - RESPONSE

You are appealing the Warden's response to your complaint regarding your sentence computation. You are requesting 652 days of credit be applied to your federal sentence.

Investigation reveals you were arrested by state law enforcement officials on April 8, 2000, for Bail Jumping and Failure to Appear. On January 17, 2001, you were transferred to the custody of the U.S. Marshals Service on the basis of a Writ of Habeas Corpus Ad Prosequendum for your federal court appearance. You were sentenced in the Western District of Texas to 78 months imprisonment for Conspiracy to Manufacture Methamphetamine. After sentencing, you were returned to the state and received a three-year sentence for the state charges. You paroled from your state sentence on June 28, 2002, to the U.S. Marshals Service for service of your federal sentence.

You were designated to the Fort Worth Federal Medical Center for service of your sentence. As a result of the language on your state judgment reflecting the sentence should be served concurrently with your federal sentence, institution staff contacted the U.S. Probation Officer. The Probation Officer contacted the sentencing judge regarding the issue of concurrent service of your state and federal sentences. Staff were informed the court intended for your federal sentence to be served consecutively to your state sentence.

Program Statement 5880.28, *Sentence Computation Manual (CCCA of 1984)*, states time spent under a writ of habeas corpus from non-federal custody will not, in itself, be considered for the purpose of custody credit. The primary reason for custody is not the federal charge. It is considered the federal court "borrows" an individual under the provisions of the writ for the purpose of the court appearance. Contact with the Texas Department of Criminal Justice has confirmed you received credit on your state sentence from April 24, 2000, until you were paroled on June 28, 2002.

As outlined in Program Statement 5880.28, *Sentence Computation Manual* (CCCA of 1984), Title 18 U.S.C. 3585(b) is the statute authorizing the award of presentence credit. This statute authorizes credit for time spent in official detention prior to the imposition of a sentence that has not been credited against another sentence. To award credit that was applied to your state sentence would be contrary to the intent of this statute.

You indicate the state judge ordered your state sentence to run concurrently with your federal sentence. However, your federal sentence was not operative when you were sentenced in state court. In addition, an order by the state judge is not binding upon the Bureau of Prisons. The state judge has no statutory authority to commence the federal sentence.

As a result of the decision in Barden v. Keohane, 921 F.2d 476 (3rd Cir. 1990), the Bureau of Prisons considers an inmate's request for presentence credit toward a federal sentence, for time spent in service of a state sentence, as a request for a *nunc pro tunc* designation. The Court in Barden held that the Bureau must consider an inmate's request for concurrent

service of the state and federal sentences. However, in accordance with our policy, a designation for concurrent service of sentence, is made only when it is consistent with the intent of the sentencing federal court, or with the goals of the criminal justice system.

When reviewing cases for possible concurrent designation to a state facility, we consider the available information, consistent with Title 18 U.S.C. § 3621, Imprisonment of a Convicted Person. We are also provided guidance in Program Statement 5160.05, *Designation of State Institution for Service of Federal Sentence*. In your specific case, we find commencement of your federal sentence by way of a concurrent designation is not consistent with the goals of the criminal justice system.

You have received all applicable credit, and your sentence computation is correct. Therefore, your appeal is denied.

In the event you are dissatisfied with this response, you may appeal to the Bureau of Prisons, Administrative Remedy Section, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in that office within 30 days from the date of this response.

11-14-03
Date

[SIGNATURE ILLEGIBLE]
for Ronald G. Thompson
Regional Director

(2)

No. 05-826

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

Douglas Edwin Pierce,

Petitioner,

v.

Cole Jeter, Warden, Federal Medical Center Fort Worth.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Solicitor General acknowledges that the court of appeals' holding, adopted at the government's urging, is consistent with the law in three other circuits but in conflict with the precedent of three others. BIO 9-10. The government does not argue that this division will repair itself without this Court's intervention. To the contrary, the division has persisted for more than fifteen years, is widely acknowledged among the courts of appeals, and has widened rather than narrowed over time. Pet. 9-11. Nor does the government dispute that the question presented is recurring[1] or that it predictably results in disparate sentences among similarly situated defendants depending on the circuit in which they are sentenced or incarcerated. In short, the government does not and cannot contest that the issue raised in this case meets all of the criteria for review by this Court.

Instead, the principal basis of the government's opposition to certiorari is its assertion that the question presented does not in fact arise in this case. That assertion rests on a dramatic repudiation of the central representations the government made to the lower courts in order to win this case below. Before the district court and the court of appeals, the government defended against petitioner's claims on the ground that the federal district court had the power to order petitioner's sentence served consecutively to any future state sentence, and had exercised that power in this case. Having prevailed on that theory below, the government now abandons it this Court, asserting that the district court did not in fact validly order consecutive sentences. Instead, the government now argues, petitioner's consecutive sentences

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[1] Indeed, the question presented has arisen in other cases even in the short time since the petition in this case was filed. See *Aguilar* v. *Peterson*, No. 04-6376, 2006 U.S. App. LEXIS 5471, at *3 n.3 (CA10 Mar. 2, 2006); *Binford* v. *United States*, 436 F.3d 1252, 1254 (CA10 2006).

are solely the result of a decision by the federal Bureau of Prisons (BOP). Certiorari therefore should be denied, the government asserts, because petitioner "does not challenge BOP's exercise of discretion; rather he seeks to challenge only action by the federal sentencing court." BIO 12.

The government's position is as remarkable as it is meritless, for the Fifth Circuit decided the question presented precisely because the government defended against petitioner's claims throughout this litigation in the lower courts on the ground that the district court *did* order a consecutive sentence and that its sentencing determination was binding. By failing to challenge the predicate for the court of appeals' legal decision – and, indeed, affirmatively advancing it – the government has waived any objection to the Fifth Circuit's conclusion that the district court validly ordered consecutive sentences in this case.

In any event, the government itself argues that it ultimately makes no difference whether the district court's order was valid or not. Instead, the Solicitor General argues that it is up to the executive branch, not the judiciary, to decide whether two sentences rendered at different times shall be served concurrently or consecutively. BIO 10-12. The question of who has the authority to make that decision – the first court, the second, or the BOP – lies at the heart of the circuit split. Given that neither the government nor petitioner now argues that the decision belongs to the first sentencing court, the government's eleventh hour challenge to the validity of the district court's sentencing order, even if permitted, poses no obstacle resolving the circuit conflict in this case.

The need for that resolution is aptly demonstrated here. The Solicitor General acknowledges that his current view of the statute conflicts with the position taken by the lawyers for BOP in the lower courts. BIO 12 n.8. He also admits that the BOP itself applied conflicting interpretations at different stages of the administrative process. *Ibid.* That the federal

government itself is so profoundly confused about the proper interpretation of this important sentencing statute, and that the question has yielded a sustained three-way conflict among seven federal courts of appeals, demonstrates the compelling need for intervention by this Court. Certiorari should be granted.

1. The government's assertion that "the question presented by the petition * * * is * * * not presented by the facts of this case," BIO 10, is premised on its untimely assertion that the "facts of this case" are not what the government represented them to be before the courts below.

a. In the lower courts, the government argued that petitioner was not entitled to credit for time served under his state sentence because "the federal sentencing court specifically stated its intention that the federal sentence run consecutively to the state sentence" and because "clear Fifth Circuit precedent supports the federal sentencing court's authority to have its sentence run consecutive to the yet to be imposed state sentence." U.S. C.A. Br. 13.[2] The court of appeals accepted both the government's factual representations and its legal argument. The Fifth Circuit thus held that the "sentencing court had the discretion to order that the federal term of imprisonment run either consecutively to

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[2] In the district court, the government likewise argued that "*the district court* clearly had discretion to order Pierce's federal sentence to run consecutively to his impending state sentence." Respondent's Motion to Dismiss with Memorandum Brief 4 (emphasis added). See also Respondent's Response to Petitioner's Traverse 2 ("Pierce has failed to state a claim for relief with respect to the claim raised in his Petition for Writ of Habeas Corpus, as *the federal sentencing court* specifically stated its intention that the federal sentence run consecutively to the state sentence, see Ex. D, p. 012 to Motion for Summary Judgment, and clear Fifth Circuit precedent supports *the federal sentencing court's authority* to have its sentence run consecutive to the yet imposed [sic] state sentence.") (emphasis added).

or concurrently with an anticipated, but not yet imposed state sentence." Pet. App. 2a. And it further found that "respondent submitted unrefuted evidence with its summary judgment motion that indicated that the federal sentencing court intended for the sentence to run consecutively to his state sentence." *Id.* 2a-3a. This was the sole ground upon which petitioner's claim for a concurrent sentence was resolved. *Id.* 3a.[3]

The Solicitor General now attempts to refute the predicate for the government's case below in order to avoid this Court's review of the legal question decided by the Fifth Circuit at the government's urging. In particular, the Solicitor General now asserts that, despite the government's representations to the contrary, the district court did not, in fact, validly order consecutive sentences because it did not express that intent in the original judgment and commitment order. BIO 10. Thus, he concludes, "the question raised by

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[3] The brief in opposition could be read to suggest that the Fifth Circuit also relied on 18 U.S.C. 3585 to deny petitioner's right to a concurrent sentence. See BIO 11. That would be incorrect. Petitioner made a separate claim to be entitled under Section 3585(b) to credit for the time served in a federal facility under a writ of *habeas corpus ad prosequendum* while awaiting his federal trial. See Pet. C.A. Br. 15-16. The court of appeals addressed that distinct claim after having rejected his asserted right to a concurrent sentence: "Finally, because the record indicates that the time that Pierce spent in federal custody pursuant to a writ of habeas corpus ad prosequendum was credited against his state sentence, the BOP correctly applied 18 U.S.C. 3585(b)(2) when it did not include *this time* as a credit toward Pierce's federal sentence." Pet. App. 3a (emphasis added). Thus, the court of appeals held that petitioner received all the credit to which he was entitled under Section 3583(b) so long as the state had counted the time in federal custody on the *prosequendum* writ against his state sentence. Petitioner does not seek review of that determination in this Court. Rather, petitioner maintains that his state and federal sentences were concurrent by operation of Section 3584(a).

petitioner is not at issue here" because petitioner "does not challenge BOP's exercise of discretion" but rather "seeks to challenge only action by the federal sentencing court." BIO 12-13. It should come as no surprise that the government's attempt to preserve the judgment below by asserting that it misled the lower courts does not withstand scrutiny.

The Solicitor General cites no on-point authority for the proposition that Section 3584 requires a court to express its concurrent/consecutive decision at the time of sentencing, see BIO 11, and no such requirement appears on the face of the provision. But the merits of that proposition are beside the point, for the government's second thoughts come far too late in the day. The court of appeals decided the case on the assumption, necessarily shared by the government, that the district court had ordered consecutive sentences *nunc pro tunc*. This Court can easily do the same, deeming the validity of the district court's order established by the government's reliance upon the order and failure to raise its current objection below.

Indeed, this Court routinely decides cases on the assumption that the court of appeals correctly resolved the predicate factual and legal questions giving rise to the question presented.[4] This practice is particularly appropriate

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[4] See, *e.g.*, *United States* v. *Georgia*, 126 S. Ct. 877, 880 (2006) (deciding Eleventh Amendment question based on the assumption that the court of appeals was correct that the plaintiff alleged actual violations of the Eighth Amendment); *Ferguson* v. *City of Charleston*, 532 U.S. 67, 76 (2001) (deciding whether state hospital's drug testing of maternity patients was an unreasonable search under the Fourth Amendment on the assumption that the court of appeals was correct that the searches were suspicionless and without valid consent); *Lilly* v. *Virginia*, 527 U.S. 116, 124 n.1 (1999) (assuming, despite defendant's suggestion otherwise, that witness was unavailable, for purposes of deciding Confrontation Clause question); *Salinas* v. *United States*, 522 U.S. 52, 55 (1997) (noting Court granted certiorari to resolve interpretation of federal

when that predicate not only went unchallenged below, but was in fact embraced by the party who now seeks to reverse its position to the prejudice of the opposing party. See, *e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 277-79 (1977) (assuming that school board was subject to suit under 42 U.S.C. 1983, and proceeding to reach the merits, where defendant failed to raise challenge to statute's applicability in the lower courts); *Lachance* v. *Erickson*, 522 U.S. 262, 266 (1998) (deciding due process question on the assumption that government employee had protected property interest in employment, given the court of appeals' statement that the point was undisputed below).

b. In any event, the timing of the district court's order is ultimately immaterial under both petitioner's and the government's view of the law. The essence of the disagreement between the parties and among the circuits is over the authority of the second sentencing court (here, the state court) to order concurrent sentences.[5] In petitioner's view, Section 3584(a) gives to the second sentencing court alone the power to determine whether the two sentences shall be consecutive or concurrent. As the Ninth Circuit observed in *United States* v. *Clayton*, 927 F.2d 491, 492 (1991), the

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bribery statute, but denied certiorari on question whether statutory predicates were met).

[5] It is true that the question presented as phrased by petitioner speaks in terms of the power of the *first* sentencing court, but petitioner can hardly be blamed for framing the question in the terms used by the court of appeals at the urging of the government. Both the petition itself and the court of appeals' decision make clear that the legal question presented by the case turns on the legal consequences of an order for concurrent sentences by the second sentencing court. Were the wording of the question presented a genuine obstacle to certiorari, this Court could simply rephrase the question in light of the government's new position, see *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992), or adopt the government's alternative phrasing. See BIO i.

under Section 3584(a), "Congress contemplated only that federal sentencing be consecutive to state convictions for which the defendant was already sentenced." Properly construed, the statute protects a subsequent state court's right to "fulfill[] its own interests by running the state sentence concurrently with the federal term." *Id.* at 493. In light of this purpose, Section 3584(a) requires the BOP to respect a state court's designation of its sentence as concurrent with an already-imposed federal sentence. See Pet. 23-26. Under this interpretation, it makes no difference whether the first sentencing court expressed its intent that the sentences should be consecutive.

The government likewise has argued in both this Court and the Fifth Circuit that the validity of the district court's order is immaterial. In the court of appeals, the government argued that even if the district court had not ordered consecutive sentences, but remained silent on the question, the last sentence of Section 3584(a)[6] would nonetheless "dictate[] that they be served consecutively absent language in the sentencing decision to the contrary." U.S. C.A. Br. 12. This interpretation of the last sentence of Section 3584(a) has been adopted by the Tenth Circuit, see *United States* v. *Williams*, 46 F.3d 57, 58-59 (CA10), cert. denied, 516 U.S. 826 (1995), but has been rejected by the Second, Sixth, and

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[6] That sentence provides: "Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." As noted above, some courts have misinterpreted this sentence to provide that if the first sentencing court is silent, any subsequent sentence rendered by another court must run consecutive to the first, regardless of the intention of the second sentencing court. As explained in the petition, Pet. 23, this interpretation is wrong. Sensibly read in context, the sentence permits the second sentencing court, not the first, to order concurrent sentences and provides that if the second sentencing court remains silent, the sentences run consecutive to one another.

Seventh Circuits, see *Romandine* v. *United States*, 206 F.3d 731, 737-38 (CA7 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1040 (CA6 1998); *McCarthy* v. *Doe*, 146 F.3d 118, 121-22 (CA2 1998).

In this Court, the government advances yet a different argument, but the district court's sentencing order is nonetheless still immaterial even under this new view. The Solicitor General now argues that both Section 3584(a) and any order of the sentencing court are entirely irrelevant because "BOP, not the federal sentencing court, has the authority to determine how much credit a defendant should receive for time spent in official detention before the commencement of his federal sentence." BIO 10-11 (citing 18 U.S.C. 3585, 3621). The Seventh Circuit's decision in *Romandine* v. *United States*, 206 F.3d 731 (2000), appears to support that view. In *Romandine*, the court concluded that the first sentencing court lacks any authority to decide whether its sentence shall be consecutive to a later sentence because that decision is left to the executive branch. *Id.* at 737-38. Under this interpretation, the government argues, the district court had no authority to order consecutive sentences (or, for that matter, concurrent sentences); any order it might have issued (timely or not) would simply be an "important consideration" in the exercise of the BOP's discretion. BIO 11-12.

Thus, whether this Court takes the case as argued by the government below or as the Solicitor General recharacterizes it now, the facts present this Court with an appropriate vehicle for resolving the recurring conflict and confusion over the proper construction of Section 3584(a).

In any case, any lingering concern over the effects of the district court's sentencing order in this case could be alleviated by granting certiorari in both this case and in *Cox* v. *United States*, No. 05-454, in which there is no question of the validity of the district court's order requiring consecutive sentences. See *Cox* BIO 4.

2. The government's only other objection to certiorari is its continuing insistence that even if BOP and four circuits are persistently misapplying Section 3584(a) to unlawfully extend the imprisonment of federal inmates, the issue "does not have sufficient practical importance to warrant this Court's review." BIO 15. This assertion is also wrong.

The Solicitor General cannot seriously contest that the lawfulness of the government's continued confinement of its citizens is a matter of paramount practical importance, as is the consistent and faithful application of the laws Congress has enacted to regulate and confine the Executive's exercise of its power to deprive individuals of their liberty. Moreover, the proper interpretation of Section 3584(a) is a matter of the utmost importance in accommodating the inherent tensions that arise under our system of dual sovereignty, affecting the delicate balance between the powers of the federal government and the effective operation of the most basic functions of the states. As set forth in the petition, the government's interpretation of Section 3584(a) permits an invasion of state prerogatives, substantially interfering with the ability of state prosecutors to reach plea bargains in the State's interest, as well impeding state courts' efforts to issue fair sentences with confidence that the defendant will, in fact, serve the time anticipated by the sentencing court. Pet. 13-14.

The government does not dispute that absent intervention by this Court, Section 3584(a) will continue to be misapplied in numerous cases, leading to substantially disparate periods of confinement for individuals with indistinguishable sentences. Instead, the Solicitor General asserts that this invasion of state prerogatives and the resulting sentencing inequities are unimportant because they are theoretically avoidable by state courts intent on defying a federal court's interpretation of Section 3584(a). See BIO 13-14. Petitioner has already explained in detail that the manipulations advocated by the Solicitor General may not be possible in

many states and, in any event, simply have not been employed. Pet. 14-18.[7] The Solicitor General's only answer is that the "federal government should not be required to surrender its independent judgment about the proper extent of a defendant's federal punishment, and reduce the length of federal imprisonment, in order to abide by the terms of a plea agreement that petitioner made with the State and that the state court accepted." BIO 15. But that answer is entirely question-begging, for it assumes that Congress did not already provide in Section 3584(a) that federal courts and the BOP are to respect the sentencing decisions of a subsequent court. If Congress has so decided, the Solicitor General's disagreement with that policy choice is no reason to condone the BOP's persistent disregard for Congress's legitimate exercise of its legislative powers. At the same time, the possibility that the Solicitor General might be right about what Congress intended, and that courts of appeals that disagree with him may be wrong, is no reason for this Court to abstain from its traditional role in resolving circuit conflicts.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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[7] The government yet again fails to offer any suggested manipulations for a second *federal* sentencing court desiring to reclaim its authority to award a concurrent sentence in the circuits giving that power to the first federal sentencing court.

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